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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA.

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY ISAAC BLACKFORD, A. M.,
ONE OF THE JUDGES OF THE COURT.

SECOND EDITION; WITH ANNOTATIONS,
BY EDWIN A. DAVIS.

VOL. IV.

CONTAINING THE CASES FROM NOVEMBER TERM, 1838, TO
MAY TERM, 1841, BOTH INCLUSIVE.

INDIANAPOLIS:
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JUDGES
OF THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

ISAAC BLACKFORD, Esquire.

STEPHEN C. STEVENS, Esquire.

JOHN T. M'KINNEY, Esquire.

CHARLES DEWEY, Esquire.*

JEREMIAH SULLIVAN, Esquire.†

*Appointed on the 30th of *May*, 1836, in the place of Judge *Stevens*, resigned.

†Appointed on the 29th of *May*, 1837, in the place of Judge *M'Kinney*, deceased.

RULES OF THE SUPREME COURT.*

XIII. The Clerk, during the term, may deliver the transcript of a cause to the counsel of either party, on being furnished with a receipt for the same. The transcript to be returned to the office within two days, or sooner if required.

XIV. All transcripts must be delivered to the Clerk at his office, and the causes be there docketed.

XV. Applications for writs of supersedeas in term time, must be made by delivering the transcripts and briefs to the Clerk at his office. And the Clerk must deliver such transcripts and briefs to the judges at their chambers, on the evening of the day on which he receives them.

XVI. When a cause in error is called, which has been docketed more than ninety days before the term, and there is no appearance for the defendant, (process not having been served ten days nor taken out sixty days before the term), the suit shall be dismissed.

XVII. If a cause be docketed on or before the first day of the term, and, if in error, the process have been served ten days before the term, the parties must be ready when the cause is called.

XVIII. No motion for a *certiorari* in cases of diminution of the record will be heard, unless the motion be made in writing, and state the defects to be supplied.

XIX. If, when a cause is called, the plaintiff fail to appear, the defendant may have the cause dismissed, or may submit it either with or without argument. If the defendant make default, the plaintiff may proceed *ex parte*.

XX. The assignment of errors shall contain the names of the parties; and process, when necessary, shall issue accordingly.

*For the previous Rules, vide Vol. 1, of these Reports, p. vii.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA.

AT INDIANAPOLIS, MAY TERM, 1835, IN THE NINETEENTH
YEAR OF THE STATE.

BROWN and Another *v.* WERNWAG, on Appeal.

DEBT on a promissory note. Plea, that the defendant had executed a mortgage on real estate to secure the debt; that the plaintiffs had obtained a decree of foreclosure and sale of the mortgaged premises; that a writ of error to the decree had been sued out by the defendant, and the cause was then pending in the Supreme Court. *Held*, on demurrer, that the plea was bad. *Stevens v. Dufour*, 1 Blackf., 387.

CARLTON *v.* LITTON, in Error.

EVIDENCE not relevant to the issue is inadmissible.

The contents of an instrument of writing cannot be proved by oral testimony, unless the absence of the instrument be first accounted for (1).

Rany and Another v. The Governor.

[*2] If a party wish to introduce a written instrument in evidence, *which is in the hands of a third person, he must take out a *subpœna duces tecum* (2).

1) With respect to the *modes* of proof, the *first* and principal rule is, that the *best evidence* of which the nature of the case admits must be adduced; and that a party must not attempt to rely on what is termed *secondary evidence*, at least without proving that the former *can not* be adduced, and *why*; as on account of *actual destruction* of an original deed, or loss, after *most diligent search*, and *subpœnaing* every person who is at all likely to have the *best evidence* in his custody or power to produce the same; and even then a jury will sometimes suspect that the best evidence is withheld, and will find a verdict against the party entirely on that account; and, consequently, in adducing *secondary evidence*, the utmost attention must be given to satisfy the jury that there is no suppression of, or want of exertion to obtain, the best description of proof. 3 Chitt. Gen. Prac., 809. See *Coman et al. v. The State*, Nov. term, 1836, post.

(2) It is of no avail merely to serve a third person, who is a stakeholder, with notice to produce a document; but he must be *subpœnaed* to produce the same. *Parry v. May*, 1 Mood. & Rob., 279.

WHITE v. MORRIS, on Appeal.

A CHANGE in a part of the *Terre Haute* State road was made and marked by a commissioner, under the act of 1833. *Held*, that the part of the road as thus changed might be opened, though the commissioner's report had not been filed in the clerk's office, &c., as the act requires.

RANY and Another v. THE GOVERNOR.

DEFAULT—RECORD.—The record of a judgment by default against the defendant for want of an appearance, should show that the process had been served. (a)

(a) See *New Albany and Salem R. R. Co. v. Welsh*, 9 Ind., 479; 5 Blackf., 332.

Rany and Another v. The Governor.

SAME—BOND—PRACTICE—PROOF.—In debt on a bond conditioned for the performance of covenants, the breaches were assigned in the declaration, and a judgment by default was taken against the defendant. *Held*, that the breaches should be proved and the damages assessed, before the rendition of final judgment.

SHERIFF'S BOND—PLEADING.—Debt against a sheriff and his sureties on a bond dated in *March*, 1820, conditioned for the faithful discharge of the sheriff's duties until the then next *August* election, and until his successor should be elected and qualified. The declaration assigned as a breach, that the sheriff had failed to pay over, &c., the revenue of the county for the year 1822, without an averment that no successor to the sheriff had been elected. *Held*, that the declaration contained no cause of action against the sureties.

[*3] ***SAME—LIABILITY OF SURETIES.**—Although the sheriff in such a case, may have been elected his own successor, and may have neglected to qualify under the new appointment, still his sureties in the bond on which the suit was brought, are not liable for his acts after he had received his new commission (b).

ERROR to the *Martin* Circuit Court.

STEVENS, J.—On the third of *March*, 1820, *Julius Johnson*, together with *Joseph Rany* and *Philip Davis*, his sureties, made their bond to *Jonathan Jennings*, Governor of the State of *Indiana*, and to his successors in office, by which they bound themselves to pay the sum of \$5,000, conditioned that the said *Julius Johnson* should well and truly perform the duties and office of sheriff, &c., during and until the general election on the first *Monday* in *August* then next succeeding the date of the bond, and until a successor should be elected and qualified; and that he, the said *Johnson*, should observe the constitution and laws of the State, touching the said office of sheriff, &c., and should well and faithfully pay over to the proper persons all the money which might come into his hands by virtue of his said office, &c.

Afterwards, in the year 1826, suit was brought upon this bond, on the relation of the treasurer of the State of *Indiana*, against the obligors; and the declaration, after stating the bond and condition, assigns as a breach, that the said *Johnson* did not well and truly perform the duties of the office of

(b) *Armstrong v. The State*, 7 Bla kf., p. 81.

Rany and Another v. The Governor.

sheriff, &c., from the date of said bond during and until the general election in *August* then next ensuing, and until his successor was elected, qualified, &c., and that he had not faithfully paid over to the proper persons all moneys which had come to his hands, &c.; and especially that he had neglected to pay over to the treasurer of the State \$300, being the revenue assessed and by him collected in his county for the year 1822. To this suit *Johnson* appeared and *confessed the action*. *Rany* and *Davis* failed to appear, and judgment was rendered against them by default. Since the rendition of the judgment *Johnson* has died; and his sureties, *Rany* and *Davis*, the other defendants, against whom judgment was rendered by default, suggesting the death of *Johnson* on the record, prosecute this writ of error to reverse the judgment and proceedings, so far as they are concerned.

The judgment against these defendants must be reversed.

Several errors exist authorizing such a reversal. The [*4] most *prominent defects are: 1. Judgment is rendered by default for want of appearance, and the record does not show that any process issued, or was served on either of these defendants. 2. The bond declared on is a penal, official bond, the condition to which is spread upon the record, and the breaches assigned; yet there is judgment not only for the debt, but final judgment also for the damages sustained by reason of the breaches, without either proof or inquiry. 3. The declaration contains no cause of action against either of these defendants.

By the laws of the State, State and county officers that are elected by the people, are elected on the first *Monday* in *August*, annually, and when a vacancy happens, provision is made for the filling of the office until the first *Monday* in *August* then next ensuing. And as it respects the office of sheriff, the statutes in force from the year 1818 to the year 1824 provided, that if any vacancy should happen in the office of sheriff, or any sheriff elect should fail to give the required bond and surety, or take the required oath, &c., the Governor should appoint and commission a person to fill the office until the

Rany and Another v. The Governor.

next annual election day, &c.; and that the person so appointed should give the required bond, &c. Under these provisions, the bond in question was given, and appears to be in strict conformity in all things to the requirements of the several provisions. By this bond these sureties became bound for the official acts of their principal, *Johnson*, from the third of *March*, 1820, until the first *Monday* in *August* of the same year, and until the successor, who might be elected, could be commissioned and sworn into office, &c.; which in no case could exceed more than ninety days after the day of the election. The sheriff at that time was the collector of the revenue, annually assessed on his county; and the transcript of the assessment roll was delivered to him for collection, in the month of *June* each year; and the sheriff to whom the transcript was delivered, had to complete the collection, although he might go out of office in the mean time. The transcript of the assessment roll for the year 1820, no doubt, came to the hands of *Johnson* for collection, in the month of *June*, 1820; and for his official duty in collecting and paying over the revenue of that year, his sureties were bound, although he might have gone, and no doubt did go out of office, under his then appointment, before he completed the collection. But this suit is not for the revenue of 1820, but for the

[*5] year 1822—two *years after the liability of these sureties undoubtedly ceased under this bond.

It is, however, insisted that we should presume that no successor was elected, and that the appointment of *Johnson* remained valid and his sureties bound. Such a presumption would be not only violent, but it would be unreasonable and unnatural. It can not be presumed that the people of a county would omit to elect their sheriff for two successive years. They meet annually to elect county and State officers, always members of the legislature and many other officers; sometimes members to congress; sometimes a governor and lieutenant governor, &c.; and it is not to be presumed that they would, when annually at the polls for these purposes, omit to elect a sheriff; such a presumption can not be indulged We

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feel confident, that such an omission did not take place; but if it did, it can not be presumed; it should have been directly averred in the declaration.

It is further insisted that *Johnson* might have been elected his own successor, and failed to give new bond and surety, by which failure, these sureties in this bond continued bound; they being bound for his acts until his successor should be qualified. If such is the truth of the case, the record does not show it. There are no such averments in the declaration; and such a state of facts can not be presumed. But suppose *Johnson* was elected his own successor, and acted without qualifying under his new commission, that would not make these men liable for his acts after he received his new commission. The liability of these sureties ended the instant he received his new commission under his election; and if he failed to qualify under that new commission, the Governor was bound to appoint some person who would qualify, to fill the office until the next annual election.

This position, as to the liability of these sureties, is sustained and confirmed by numerous adjudications.

The case of *The United States v. Kirkpatrick et al.*, 9 Wheat., 720, was a suit upon a bond which was given to the *United States*, conditioned for the faithful, &c., discharge of the duties of a collector of direct taxes, by *Samuel M. Reed*, who was appointed to that office. *Reed* was afterwards appointed his own successor, but never gave any other bond or security; and after his re-appointment he became a defaulter. It [*6] was held that the *new commission revoked and vacated the first; and that his sureties were only bound for his acts under the first commission, and not under the new commission.

The case of *Bigelow v. Bridge*, 8 Mass. Rep., 275, was an action of debt upon a bond given by *Bridge* for the discharge of duties, &c., as county treasurer. The office was elective annually, and *Bridge* was elected his own successor for a number of years, but never gave any bond except the first year. The Court decided that his sureties were only liable for the

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first year; that his re-election vacated and put an end to his first appointment; and that his sureties were not bound for his performance under his new appointment.

The case of *The Liverpool Water Works Company v. Atkinson et al.*, 6 East., 507, is in point. It was this: The company appointed *Atkinson* to collect their revenues, and he entered into bond with *Harpley*, his surety. The condition of the bond recited, that *Atkinson* would well and diligently collect their revenues, &c., from time to time for twelve months; and at all times thereafter, during the continuance of such his employment, &c.; and that he would well and truly account, &c. It was held that the liability of the surety was limited to twelve months.

Lord *Arlington v. Merricke*, 2 Saund. Rep., 411, is a similar case. Lord *Arlington* appointed one *Jenkins* his deputy post master for six months. The condition of his bond was, that he was appointed for six months; and that he would, during all the time he might continue in such office, faithfully discharge his duties, &c., account, &c. He remained in office for upwards of three years, without any further appointment or bond. It was held that his surety was only liable for the first six months.

The case of *The Wardens of St. Saviours v. Bostock et al.* 2 Bos. & Pul. New Rep., 175, was debt upon the bond of a collector of church rates. The condition of the bond recited the appointment, and then stated that he was to collect and account for the then rates, and also all and every other rate and rates thereafter to be made. It was however held, that the sureties were only liable for that single appointment, and not for his appointment in the ensuing year.

The case of *Dance et al. v. Girdler et al.*, 1 Bos. & Pul. New Rep., 34, was an action on a collector's bond. *A, B,*
 [*7] *C, &c.*, *the governors of the society of musicians, appointed one *Horwood* their collector, and he gave bond and surety to *A, B, C, &c.*, payable to them as governors, &c., and to their successors in office; conditioned for *Horwood's* faithful discharge of duties, &c. Afterwards the society

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was incorporated by letters patent, and *Horwood* continued to collect, &c., after the society was incorporated; and it was held that the surety was not liable for the acts of the collector, after the society became incorporated.

The case of *Thompson v. Young et ux.*, 2 Ohio Rep., 334, has some bearing on the question. In 1811, the Bank of *Muskingum* was incorporated, to continue until the first day of *January*, 1818. The company duly organized, and appointed one *Marple* their cashier, who gave bond and surety. There was no limit as to time, either in his appointment or his bond. Before the expiration of the charter of the bank, the legislature extended it from the first of *January*, 1818, to the first of *January*, 1843. The bank was not re-chartered, but the old charter was simply extended. *Marple* continued to act as cashier, after the time that the charter would have expired if it had not been extended, without being re-appointed and without giving a new bond. On suit being brought upon this bond, it was unanimously held, that the sureties were not liable for any defalcations made by the cashier after the expiration of the time to which the original charter was limited.

Numerous other cases might be noticed of a similar import, but it is not supposed to be necessary, as this is to us a very clear case.

Per Curiam.—The judgment as to the plaintiffs in error is reversed. To be certified, &c.

C. Fletcher and *D. M'Donald*, for the plaintiff.

W. Herod, for the defendant.

[*8]

*COONS v. THOMPSON.

DEPOSITION—WHEN ADMISSIBLE.—The deposition of a prosecuting attorney of one of the circuits was taken, under the statute, to be read in evidence on the trial of a cause in another circuit, if the witness should not be able to attend. *Held*, that the circumstance that the official duties of the witness,

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at the time of the trial, required his attendance at a different place from that of the trial, was *prima facie* sufficient to authorize the admission of the deposition.

ERROR to the *Johnson* Circuit Court.

BLACKFORD, J.—Trover by *Coons* against *Thompson*. Plea, not guilty. The cause was submitted to the Court without a jury. On the trial, the defendant offered in evidence the deposition of *W. J. Brown*, the prosecuting attorney of a different circuit from that in which this case was tried. The time fixed by law for the sitting of the Circuit Court, in one of the counties of the circuit in which Mr. *Brown* was prosecuting attorney, was the same with the time when the trial in the cause under consideration took place. The plaintiff objected to the admission of the deposition. The Circuit Court overruled the objection, and the deposition was read. Judgment for the defendant.

The only error assigned is, that the deposition was improperly admitted. The ground relied on against the admission of the deposition is, that Mr. *Brown's* office did not show his inability to attend in person to give evidence.

The statute on the subject is, that when it appears that a witness is unable by age, sickness, or otherwise, to attend the court, the deposition of the witness may be taken to be read in evidence on the trial, if the witness himself should not be able to attend. Rev. Code, 1831, p. 407. It appears to us, that the facts sufficiently show that the witness was unable to attend at the trial of this cause. At the time of the trial, Mr. *Brown's* office required his personal attendance at a different place than that of the trial. That circumstance was sufficient, *prima facie*, to authorize the admission of the deposition.

On the trial of Col. *Burr*, the defendant moved for a *subpœna duces tecum* to the President of the *United States*. The Court granted the motion; but intimated that if the President's duties demanded his attention at the time of the trial, he would be excused for not attending to the *subpœna*. 1 *Burr's Trial*, 124.

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In the case before us, Mr. *Brown's* duties required his presence at a different court, when his deposition was [9*] offered; and it * must be presumed, from what appears in the record, that the witness was unable to attend at the time of this trial. The case is therefore within the statute, and authorizes the admission of the deposition.

The Court in *North Carolina* says that it is the common practice to receive the depositions of all such public officers, whose duties oblige them to attend at a particular place. *Mushrow v. Graham*, 1 Hayw., 361; 3 Amer. Dig., 225.

We consider that the Circuit Court, in admitting Mr. *Brown's* deposition, decided correctly.

Per Curiam.—The judgment is affirmed, with costs.

P. Sweetser, for the plaintiff.

C. Fletcher and *W. W. Wick*, for the defendant.

FREEMAN v. HUKILL, in Error.

A JUDGMENT by default was set aside by consent of parties, on the condition that the defendant should, within twenty days, give sufficient bail to the sheriff, or that execution should issue on the judgment. *Held*, that this proceeding was incorrect.

It was ordered by the Circuit Court, that a non-resident plaintiff should give security for costs within twenty days, or that the suit should be dismissed. *Held*, that the Court (the security not having been given according to the order), might permit the plaintiff, at the next term, to file the bond for costs.

Pleas in abatement must be filed on or before the day on which the cause is docketed, at the first term at which the cause stands for trial.

Doubleday and Another, Administrators, v. Makepeace.

DOUBLEDAY and Another, Administrators, v. MAKEPEACE.

NEW TRIAL—ABSENCE OF MATERIAL WITNESS.—A bill in chancery was filed to obtain a new trial of a suit at law. The bill relied on the absence of a material witness for the complainant at the time of the trial, whose place of residence was then unknown; but it did not state that any diligence had been used before the trial to find the witness, or to procure his testimony; and it appeared that the suit at law was not brought until several years after the cause of action had accrued. *Held*, that the bill should be dismissed. (a)

[*10] APPEAL from the *Tippecanoe* Probate Court.

STEVENS, J.—*Makepeace* in *October*, 1832, declared against *Doubleday* and *Jenny*, administrator and administratrix, &c., in assumpsit on promises said to be made by their intestate several years before his death, for goods and chattels sold and delivered, use and occupation of land, and for money had and received. Pleas, non-assumpsit, statute of limitations, and payment. Judgment for the defendants. In *November*, 1833, *Makepeace* filed a bill in chancery for a new trial in the suit at law, on which, after answer, &c., a new trial was granted, and *Doubleday* and *Jenny*, the defendants, appealed to this Court.

The question in this Court is—Is the complainant entitled to the relief sought?

Applications to a court of chancery for a new trial, after a trial at law, are in our time very rare. The practice, except in cases the most extraordinary, has long since gone out of use, because courts of law are now competent to grant new trials, and are in the constant exercise of that right to a most liberal extent. Anciently, courts of law did not grant new trials, and in those days courts of equity exercised that jurisdiction over trials at law, and compelled the successful party to submit to a new trial, when justice required it; but even in that age, the court of chancery proceeded with great caution. A new trial

(a) See 22 Ind., 357; Id., 358; 21 Id., 95; 25 Id., 236; 18 Id., 434; 22 Id., 383; 30 Id., 183, 18, 13 Id., 357; 10 Id., 451, 568; 6 Id., 474; 2 Id., 117, 122; 6 Blackf., 85, 439, 496.

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was never granted, unless the application was founded upon some clear case of fraud or injustice, or upon some newly discovered evidence, which the party could not possibly, by any vigilance or industry of his, have had the benefit of on the first trial.

In the case of *Curtis v. Smallridge*, 1 Chan. Ca., 43, it clearly appeared that the recovery was unjust, and had been so admitted by the defendant; yet as it did not appear that the party seeking the relief, was prevented by any unavoidable accident from having his witnesses at the trial in the court of law, the bill was dismissed. In the case of *Tovey v. Young*, Prec. Chan., 193, the bill for a new trial was dismissed although the witness on whose testimony the judgment at law was founded, was, after the trial, discovered to be interested. In the case of *Richards v. Symes*, 2 Atk., 319, a new trial was refused, although it clearly appeared that the party was not apprised of the evidence he had to encounter, and

[*11] was therefore unprepared *to meet it. And in a very early case, *Sewel v. Freestow*, 1 Chan. Ca., 65, a new trial was refused, although the defendant at law had written a letter which would have defeated him, if the plaintiff could have proved it at the trial; and which, after the trial, he discovered evidence to prove. And it may be added that since the decision in the King's Bench, in *Bright v. Eynon*, 1 Burr., 390, the doctrine of new trials being enforced in the courts of law, by courts of equity, is almost entirely overruled, on the broad ground that there must be an end to litigation. In the case of *Bateman v. Willoe*, 1 Sch. & Lef., 201, Lord *Redesdale* observed, that a bill for a new trial was watched by equity with extreme jealousy, and it must see that injustice has been done, without the fault, negligence, or inattention, of the party seeking the relief.

In the case now before us, the decree can not be sustained. The claim on which the relief is sought is stale; part of it was barred by the statute of limitations when the suit at law was commenced; and the remainder is now barred. If there were no other objections, that of itself would paralyze the hand of

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equity. The complainant has slept over his rights, if any he had, for years, and until the person against whom he claims is dead, and there is no one who understands the truth of the case left surviving, to protect the interests of the deceased. Neither law nor equity favours the negligent and sleeping. But that is not all; he has not shown that he used any diligence to procure the attendance of witnesses, or to procure evidence at the trial at law. Nor has he shown that he had not all the witnesses and evidence on that trial that he expected to have. He has alleged nothing of the kind. He shows that he went into that trial willingly, and makes no complaint about the witnesses not attending, or about the lack of evidence. He did not apply to the Court to continue the cause, nor for a new trial. He says, however, that he has discovered a new and material witness, and that at the former trial he did not know where said witness resided. But by his own showing, it is clear that he knew as well before that trial, what that witness knew about the matter in controversy, as he now knows; and he does not allege that he made any inquiry after him, or endeavored in any way to find him, or to procure his testimony. It is plain that he made no such exertion, but went knowingly and willingly into the trial without him.

[*12] The only apology he makes *for having lost his suit at law is, that he was lying sick at the time of the trial; but he does not inform us how that caused him to lose his case. Nor does he inform us how long before that trial, he had been confined by sickness. He says the cause was tried in the absence of his material witnesses, but he does not inform us that any were absent that he expected would be there, or that he had endeavored to procure the attendance of any that were not there; nor does he allege that he would have been better prepared, or would have gained his case, if he had not been sick. The record shows that he was represented on that trial by two very respectable attorneys at law, and it is not to be presumed that they neglected his interests; but if they did, he must look to them for relief as to that, and not to a court of equity.

Denby v. Hart, in Error.

This is not a case in which a court of equity can interfere with a judgment at law, and the decree must be reversed (1).

Per Curiam.—The decree is reversed, with costs. Cause remanded, with directions to the Circuit Court to dismiss the bill.

A. S. White, for the appellants.

W. W. Wick, for the appellee.

(1) Vide *Lansing v. Eddy*, 1 Johns. Ch. Rep., 49; *Simpson v. Hart*, Id., 91, *Smith v. Lowry*, Id., 320; *Woodworth v. Van Buskerk*, Id., 432; *Barker v. Elkins*, Id., 465; *Dodge v. Strong*, 2 Id., 228; *Foster v. Wood*, 6 Id., 87; *Floyd v. Jayne*, Id., 479; the cases in 2 Bart. & Harr. Eq. Dig. 80 to 83; *Deputy v. Tobias*, Vol. 1, of these Rep., 311; note 2 to *Coe v. Givan*, Id., 367.

BELL v. TROTTER, in Error.

JUDGMENT for the plaintiff in a suit before a Justice of the peace. Appeal to the Circuit Court by the defendant. The Circuit Court dismissed the suit; and, on a writ of error, the judgment of dismissal was affirmed. The reason given for the affirmance was, that it did not appear from the transcript of the record, that the plaintiff below had filed any statement of his demand, or any note or other writing relied on as the cause of action.

[*13]

*DENBY v. HART, in Error.

A JUDGMENT of the Circuit Court for the plaintiff, on an appeal from the judgment of a justice of the peace, must be reversed, if the transcript of the record do not disclose the cause of action. But any statement, however short or informal it may be, will answer the purpose, provided enough be shown to bar another action for the same demand.

Richardson v. Vice.

RICHARDSON v. VICE.

EVIDENCE—JUSTICE'S DOCKET.—To prove the issuing of a distress warrant by a justice of the peace on a particular day, the entries on the subject in the justice's docket (the docket being proved), are competent evidence.

EVIDENCE OF CONTENTS OF LOST WARRANT.—If a distress warrant be proved to be lost, parol evidence of its contents, of its return, and of the constable's proceedings under it, are admissible.

DISTRESS WARRANT—LIABILITY FOR TAKING OUT.—It is not necessary to the liability of a person for improperly taking out a distress warrant, that he should have made affidavit in order to procure the warrant.

SAME.—A justice of the peace has no authority, in the case of a distress warrant, to render a judgment for the amount of rent supposed to be due.

SAME.—The party procuring a distress warrant to issue is answerable for the consequences, whether the rent claimed be or be not of such a nature as to authorize the warrant.

SAME.—If a landlord distrain and sell goods for rent before the same is due, he is liable by statute for an action of trespass on the case.

ERROR to the *Hendricks* Circuit Court.

BLACKFORD, J.—*Vice* brought an action on the case in the Circuit Court against *Richardson*. The complaint is, that the defendant had distrained and sold certain property of the plaintiff's for rent, when no rent was due. The action is founded on the 4th section of the act of 1831, regulating distress for rent. Plea, not guilty. The jury found the defendant guilty, and that the value of the property distrained and sold was fourteen dollars. Judgment, conformably to the statute, for twenty-eight dollars, being double the value of the property distrained and sold, together with costs.

The plaintiff introduced the entries in a docket of a justice of the peace, to show that a distress warrant had
 [*14] issued against **Vice* on the 26th of *November*, 1833, upon the application of *Richardson*. The plaintiff also proved, by the justice, the contents of the distress warrant and of the return, having first proved the loss of the warrant. The plaintiff also proved, by the constable, the sale of the property by him, on the 17th of *December*, 1833, by virtue of the distress warrant. All this evidence was objected to, but

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was admitted by the Court. To prove that no rent was due, at the time of the distress and sale, the lease from *Richardson* to *Vice* for the land was introduced; the execution of the lease being first proved by the subscribing witness. This lease showed the rent not to be payable until the 1st of *January*, 1834. An objection was made to the admission of the lease as evidence, but the objection was overruled.

There is no error in the admission of any of the testimony to which we have referred. The docket of the justice was proved by himself, and the entries were competent evidence. The distress warrant was proved by the justice to have been lost by him, after it had been returned by the constable. Parol evidence of its contents, of its return, and of the constable's proceedings under it, was therefore admissible. The execution of the lease was proved by the subscribing witness, and the objection to the lease as evidence was therefore untenable. The defendant below contends, that as the affidavit on which the distress warrant issued was not produced, the warrant was not admissible evidence. We are of a different opinion. The application for the warrant by *Richardson*, and his procurement of it, made him liable, whether there was any affidavit or not. The defendant below offered to prove that the plaintiff, before the distress, was removing a part of the property from the premises. This evidence was correctly rejected. It had nothing to do with the merits of the cause.

The entry on the docket of the justice, who had issued the distress warrant, showed that the justice had rendered judgment in favour of *Richardson* against *Vice* for twenty-four dollars, in the case commenced by the warrant, as the amount of rent due on the lease. The Circuit, at the request of *Vice*, informed the jury that this entry was not evidence, as the justice had not, in the case before him, any jurisdiction relative to the rent. This instruction was objected to, [*15] but without *cause. The justice had no authority, in the case of the distress warrant, to render a judgment for rent; and his proceeding on that subject is *coram non jndice* and void.

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Richardson requested the Court to charge the jury, that as the rent was payable in corn, the justice had no authority to issue the warrant, and that therefore this action would not lie. This charge was correctly refused. It is not material whether the warrant was issued without authority or not. It was issued on the application of *Richardson*, and he is answerable for the consequences. Suppose a court, on the application of a party, issues a writ in a case in which the court has no jurisdiction, and the sheriff, in obedience to the writ, imprisons the defendant, it is certainly no defense for the plaintiff, or the sheriff, in an action against them for the imprisonment, that the court had no jurisdiction of the subject. The law is the same in the case before us.

The Court instructed the jury, that *Richardson* had no right to distrain until the time the rent became due; which time, by the contract, was the 1st of *January*, 1834; and that evidence, that the distress and sale were under color of law, and that no rent was then due, was sufficient for the plaintiff. This charge is unobjectionable.

The truth of the case is, as the record shows, that the distress and sale of the property took place a considerable time before the rent became due; and the statute is express that the party, in such a case, at whose instance the distress was made, is liable to an action of trespass on the case.

Per Curiam.—The judgment is affirmed, with five *per cent.* damages and costs.

H. Brown, for the plaintiff.

J. Morrison, for the defendant.

SILVER and Others v. THE GOVERNOR, in Error.

A PERSON being commissioned a justice of the peace, executed a bond with surety to the Governor, conditioned for

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the faithful discharge of his official duties, and for the payment, to the persons entitled, of all moneys that should come [16*] into his *hands by virtue of his office. At the time the bond was executed, there was no statute in force authorizing the execution of such a bond by a justice of the peace. *Held*, that the bond was not warranted by law, and that no suit could be sustained on it (1).

(1) See cases cited in *Byers et al. v. The State ex rel.*, 20 Ind., 47.

M'GEE v. GIVEN and Another.

TRESPASS—PLEADING.—Trespass for breaking and entering the plaintiff's close and stable, and taking away two horses. Plea, that an execution of *fieri facias* against a third person was delivered to the sheriff, &c.; that the horses belonged to the execution-debtor and were subject to the execution; that the sheriff, by virtue of the execution, and the defendants by his command, broke and entered into the close and stable and took the horses, &c. Replication, that the horses did not belong to the execution-debtor, but to the plaintiff. *Held*, on general demurrer, that the replication was sufficient.

ERROR to the *Hendricks* Circuit Court.

STEVENS, J.—*M'Gee* declared against *Given* and *Nave*, in an action of trespass *with force and arms*, for entering into his close, breaking his stable door, and taking and leading away two certain geldings. The defendants by their plea admit that they did, in manner and form as charged, enter the close and break the stable door of him, the said *M'Gee*, and take and lead away the said two geldings; but they justify the act, under and by virtue of two certain writs of execution of *fi. fu.* which they allege were then in the hands of the sheriff of the county against a certain Mr. *Teel*, to be levied on the goods and chattels, &c., of the said *Teel*; and that the said two geldings were the goods and chattels of the said *Teel*, and subject to said writs of execution; and that they, by the command of the said sheriff, and as his servants, entered with the

said sheriff into the said close and stable, and took and led away said geldings as the goods and chattels of the said *Teel*, under and by virtue of the said writs of execution. *M'Gee* replied that the said two geldings were not the goods and chattels of the said *Teel*, but that they were the goods and chattels of him, the said *M'Gee*. To which replication the defendants filed a general demurrer. The demurrer was sustained, and final judgment rendered for the defendants.

[*17] *The only question presented by this case for our consideration is as to the sufficiency of the replication. The Court below declared it insufficient; and we are asked to do the same.

The objection raised is, that it does not sustain the declaration; that it abandons the cause of action set out in the declaration, and is what is called a departure in pleading. It is a well settled rule, that the replication must not depart from the allegations in the declaration. A departure in a replication is said to be, when the plaintiff quits or departs from the original cause of action in his declaration, and has recourse to another which is distinct from and does not fortify the first. In the present case the cause of action laid in the declaration, is the breaking and entering of the plaintiff's close, and breaking down his stable door, &c., with force and arms, &c. The defense unqualifiedly admits the whole charge in the declaration to be true, but avers that the defendants might lawfully do so, because of, and by virtue of, two certain writs of execution, which it is alleged were in the hands of the sheriff, to be levied on the goods and chattels, &c., of one *Teel*, and that two certain geldings, the goods and chattels of the said *Teel*, were on the premises and in the stable of him, the plaintiff, and that they broke and entered as charged, &c., to execute the said geldings as the goods and chattels of the said *Teel*, as they lawfully might, &c. Now if the whole of the facts alleged in justification are not true, the plaintiff's cause of action stands confessed. The justification set up consists of two distinct sets of facts. First, as to the existence of the writs of execution against the goods and chattels of *Teel*,

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&c. Secondly, as to the two geldings being the goods and chattels of *Teel*, &c. Both must be true or the plaintiff must recover. The writs of execution against *Teel* could not justify an entry into the close of a stranger, unless the goods and chattels of *Teel* were there: hence both sets of facts must be true, or the plaintiff must recover. All the plaintiff had to do, to sustain his declaration, was, in a proper manner, to deny either one or both of these facts; for if either should prove to be untrue, the cause of action would stand confessed. The replication admits the fact of the existence of the execution to be true, but denies that the said geldings were the goods and chattels of *Teel*.

This replication is very informal, but it is clearly good in substance. The defendants have confessed that they
[*18] are *trespassers, in manner and form, as they stand charged, if these said geldings were not the goods and chattels of the said *Teel*, and the plaintiff has tendered an issue upon that fact. All the other facts in the case stand confessed on both sides, leaving that single allegation in dispute. If that allegation shall prove to be false, the plaintiff will recover his cause of action laid in the declaration, just as it is there laid. The simple question is, were these geldings the goods and chattels of *Teel*, and subject to these executions? It is perfectly immaterial to whom the geldings did belong, if they did not belong to *Teel*.

The demurrer to this replication is general and should have been overruled. There is nothing that presents even a shadow of a departure in pleading, and the informality of the replication can not be reached by a general demurrer (1).

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. W. Wick and *J. Morrison*, for the plaintiff.

C. Fletcher, for the defendants.

(1) In the case in the text, the plaintiff could not deny all the allegations in the plea, by the general replication of *de injuria sua propria absque tali causa*; because the execution, which is a matter of record, could only be denied by a replication of *nul tiel record*. But the plaintiff might, after

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admitting or protesting the execution, have replied, *de injuria sua propria absque residuo causæ*; and such a replication would have put the defendants on the proof that the horses of the execution-debtor were in the plaintiff's stable, and that the sheriff, and the defendants by his command, entered and seized the horses under the execution. *Lucas et al. v. Nockells*, 10 Bingh., 157.

The sheriff may break open the *outer door* of a barn or out-house, detached from the dwelling house, in order to execute a *fieri facias*, even without making a demand that the door should be opened. *Penton v. Browne*, 1 Sid., 181, 186; Wats. on Sheriffs, 173; Smith's Lead. Cas., 45. In a leading case respecting the sheriff's right to break open doors, the following points are resolved:

1. The house of every one is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose.

2. When any house is recovered by any real action or by *eject firmæ*, the sheriff may break the house and deliver the seisin or possession to the defendant or plaintiff.

3. When the king is a party, the sheriff (if the doors be not open) may break the party's house, either to arrest him or to do other execution of the process, if otherwise he can not enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open the doors.

4. When the door is open, the sheriff may enter the house and do execution, at the suit of any subject, either of the body or of the goods; but the sheriff can not (on request made and denied), at the suit of a common person, break the defendant's house, *sc.*, to execute any process at the suit of any subject.

[*19] *5. The house of any one is not a castle or privilege but for himself, and does not extend to protect any person who flies to his house, or the goods of any other which are brought into his house, to prevent a lawful execution and to escape the ordinary process of law. *Semayne's case*, 5 Coke's Rep., 91.

If the defendant, after an arrest on *civil* process, escape to the house of a stranger, or to *his own house*, the officer may, upon fresh suit, break open the *outer door* in order to retake him. And in *criminal* cases, the *outer door* of the house of the defendant or a stranger may be broken open by the officer, in order to arrest the defendant in the first instance. Foster's Cr. Law, 319, 320. So, also, such door of a stranger's house may be broken, for the purpose of levying an execution on the defendant's goods, *if they be fraudulently concealed there*. Wats. on Sheriffs, 59, 174.

In the cases, whether criminal or civil, in which the sheriff may break open the *outer door* of a dwelling house, either of the defendant or of a stranger, to execute process, a demand of admission should first be made. *Burdett v. Abbott*, 14 East, 1, 163; *Lannock v. Brown et al.*, 2 Barn. & Ald., 592; Foster's Cr. Law, 319, 320; *Hutchison v. Birch*, 4 Taunt., 619.

The *inner door* of a house, though it be the door of a lodger's room, and cupboards, trunks, &c., may be broken open by an officer, even in civil cases,

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to execute the duty of his office, *without any demand that they should be opened*. *Lee v. Gansel*, Cowp. 1; *Hutchison v. Birch*, supra; *Lloyd v. Sandilands*, 8 Taunt., 250.

The sheriff enters the house of a stranger at his peril. If the defendant or his goods be not found there, the sheriff is a trespasser. It is otherwise, however, if the sheriff enter the defendant's own house. He may not find the defendant or his goods there, and still justify the entry. And it is held, that under a *fieri facias* against the goods of an intestate, in the hands of his administrator, or of her husband and her, in her right since the marriage, the sheriff may justify an entry into the husband's house to search for goods of the intestate, though none be found there, that being the most natural custody for them. *Cooke v. Birt*, 5 Taunt., 765.

On the subject of this note, *vide* Smith's Leading Cases, 39 and notes; *State v. Thackam et al.*, 1 Bay's Rep., 358; *State v. Smith*, 1 New Ham. Rep., 346; *Haggerty v. Wilber*, 16 Johns. Rep., 287; 1 East's Cr. Law, 321 to 324.

HUFF v. GILBERT, in Error.

REPLEVIN. Pleas: 1. That the defendant had not taken or detained the property. 2. Property in a stranger. 3. Property in the defendant. The plaintiff joined issue on the first plea, and replied to the second and third, property in himself. Verdict, "We find the property to be in the plaintiff." Judgment against the defendant for costs. *Held*, that this verdict did not authorize a judgment for the plaintiff, as the jury had not found that the horse had been taken or detained by the defendant (a).

[*20] *A bill of exceptions relative to the affidavit and bond in this case, stated—"which affidavit and bond are made a part of the record." *Held*, that this statement did not make the affidavit and bond a part of the record; and that to make them so by means of a bill of exceptions, they should be copied into the bill (1).

(a) See *Mills v. Simmonds*, 10 Ind., 464.

(1) Vide *The State Bank of Indiana v. Brooks*, May term, 1838, note.

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THE STATE, on the relation of BROWN v. LEWIS, in Error.

WHEN a justice of the peace binds a person in a recognizance to the Circuit Court to answer an accusation of bastardy, the original recognizance should be filed by the justice in the Circuit Court.

It is no objection to such a recognizance, that it is entered into by a third person and not by the party himself.

TREADWAY v. DRYBREAD, in Error.

SUIT by the assignee against the assignor of a promissory note. The plaintiff had obtained judgment against the maker, and sued out a *fiery facias*, which was returned *nulla bona*. Held, that as the plaintiff had held the note fourteen months after it became due, before he brought the suit, and gave no satisfactory reason for the delay, he had been guilty of gross negligence, and ought not to recover against the assignor. *M'Kinney v. M'Connel*, 1 Bibb, 239; *M'Ginnis v. Burton*, 3 *id.*, 6; *Campbell v. Hopson*, 1 Marsh., 228; *Merriman v. Maple*. 2 Blackf., 350.

[21*] S. HAWKINS, Executrix, v. JOHNSON.

LAND-OFFICE CERTIFICATE—ASSIGNMENT OF.—A land-office certificate issued in favor of the heirs of A, can not be assigned by the administrator of A.

SAME—CONSIDERATION.—If such an assignment be made, the consideration paid for it may be recovered back in an action for money had and received.

SAME.—The amount paid for the assignment is to be ascertained, in the absence of other testimony, by the price of public land at the time of the assignment.

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ADMINISTRATOR DE SON TORT.—If a widow continue in the possession of her deceased husband's goods and use them as her own, she is liable as an executrix *de son tort*.

INTEREST.—The statute gives interest for money had and received, where the money is retained without the owner's knowledge, or where it is retained after it has been demanded. But interest is not recoverable, in other cases, on a count for money had and received.

ERROR to the *Switzerland* Probate Court.

BLACKFORD, J.—This was an action of assumpsit, brought by *Gabriel Johnson* against *Sarah Hawkins*, executrix of *Jonathan Hawkins*, deceased. The declaration contains but one count, and that is a general one for money had and received. The defendant pleaded non-assumpsit, and *ne unques executor*. The cause was submitted to the court without a jury; and judgment was rendered for the plaintiff below for \$156. A bill of exceptions sets out the evidence.

A land-office certificate for further credit, was issued in *September*, 1821, by the register of a land-office, in favor of the heirs of *Truman Richards*. The certificate is for eighty-two acres of land and sixty hundredths of an acre. There is, on the back of this certificate, an assignment as follows: "For value received, I do assign, set over, and transfer, unto *Gabriel Johnson*, all the right, title, interest, and claim, of the heirs of *Truman Richards*, deceased, in, to, and over the N. E. qr. sec. 9, T. 3, R. 3, W., in the district of lands ordered to be sold at *Cincinnati*. Given under my hand and seal this 27th day of *June*, 1827. *Jonathan Hawkins*, administrator of the estate of *Truman Richards*, deceased. (Seal.)" Previously to this assignment, one-half of the purchase-money had been paid; and, at the date of the assignment, no forfeiture for non-payment had taken place. The defendant is the widow of *Jonathan Hawkins*, the assignor of the certificate. She continued, after her husband's death, to occupy the plantation he lived on; and she kept, and continues to keep, all the personal property of which her husband died possessed. The [22*] defendant deals with *this personal property, as if it were her own, but she has not been known to sell any of it.

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Upon the evidence which we have now stated, the cause was submitted to the Court, and a judgment rendered for the plaintiff below, as we have already mentioned.

There can be no doubt but that the defendant, by keeping possession of her husband's goods after his death, and using them as her own, rendered herself liable as an executrix *de son tort*. See 1 Williams on Executors, p. 136. It is equally clear, that the land-office certificate which was issued in the name of the heirs of *Truman Richards*, and belonged to them, could not be assigned by the defendant's husband, as the administrator of *Truman Richards*. The assignment of the certificate to the plaintiff below is absolutely void; and the assignor's estate in the hands of the defendant, is liable to the assignee for the amount paid for the assignment. The consideration, received by the assignor for the void assignment, may be considered as so much money had and received by him for the use of the assignee.

The difficulty in the cause is, as to the amount for which the judgment in favour of the plaintiff below should be rendered. There was no proof whatever before the court, as to the actual amount paid by the plaintiff to the defendant's testator for the assignment of the certificate. We can only look at the certificate itself, in order to form any opinion respecting the consideration of its assignment. The price of public land, at the time when the certificate was assigned, was \$1.25 an acre. At that rate, the one-half of the value of the land mentioned in the certificate was \$51.62. An additional payment of the same amount into the land-office, would have entitled the owner of the certificate, at the time of its assignment, to a patent for the land, under the act of Congress of 1826. The certificate, therefore, in the absence of other testimony, must be considered as worth \$51.62, at the time it was assigned; and that sum, in the absence of all information except what is furnished by the certificate, may be presumed to be the amount paid for the assignment. If the consideration was more, the plaintiff should have proved it; if it was less, the proof lay on the defendant.

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[*23] *This case is somewhat like one brought by an assignee of a promissory note against the assignor, to recover back the money paid for the assignment. There the value of the note, as shown by itself, is *prima facie* evidence of the consideration paid for the assignment. Here, the value of the certificate as appears by its face, may be viewed in the same light.

As there is but one count in the declaration, and that is a general one for money had and received, the plaintiff can recover no interest in the case, unless the right to do so is given by statute. *Walker v. Constable*, 1 Bos. & Pull., 306. There are two cases in which the statute gives interest on money had and received; one is, where the money is retained without the owner's knowledge; the other, where it has been retained after a demand of it. Rev. Code, 1831, p. 290 (1). The case before us does not come within this provision of the statute.

The judgment of the Probate Court is, according to the view which we have taken of the case, for too large an amount, and must therefore be reversed.

As the defendant pleaded *ne unques executor*, and the plea is not true, the judgment against her at common law would be *de bonis propriis*. But our statute has changed the law on this subject (2).

The judgment of the Probate Court should be in favour of the plaintiff below for \$51.62, together with costs, to be levied of the assets of the testator if the defendant have so much, but if not, then the costs out of the defendant's own goods.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Dumont, for the plaintiff.

J. Sullivan, for the defendant.

(1) Accord. Rev. Stat., 1838, p. 336.

(2) B. Code, 1831, p. 169. Accord. Rev. Stat., 1838, p. 190.

[*24] *DE CAMP and Another v. STEVENS.

CONTRACT—RECOVERY ON PART PERFORMANCE.—A person contracted to work for a year at a certain sum per month; but after working three months and ten days, he left his employer and sued him for the work thus done. It was proved that the defendant had manifested a disposition to get the plaintiff to leave him, and had said after the plaintiff was gone, that he was glad of it, as the plaintiff was worth nothing. *Held*, that the action was not sustained (a).

JURY—CREDIBILITY OF WITNESS.—The jury are the exclusive judges of the credibility of witnesses.

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APPEAL from the *Fayette* Circuit Court.

M'KINNEY, J.—This is an action of assumpsit brought by *Stevens* against the *De Camps*, on an account. The case originated before a justice of the peace; and an appeal from the judgment of the justice, in favour of the plaintiff, was taken by the defendants to the Circuit Court. In that Court judgment was rendered, on the verdict of a jury, for the plaintiff. During the trial in the Circuit Court, certain instructions were given to the jury, on the alleged incorrectness of which, and the refusal to grant a new trial, the defendants ask a reversal of the judgment.

The material item in the account of the plaintiff below, is for three months and ten days' labor, at the rate of nine dollars per month. From the evidence, all of which is before us, it seems that the contract was for a year's labor, at the rate of nine dollars per month. With this evidence submitted to the jury, the defendants asked the court to give this instruction: "That if they believed the evidence given in the cause, the jury must find for the defendants, as the law arising on the evidence is in favour of the defendants." The Court refused to give the instruction, but charged the jury: "That if they believed the evidence they must find for the defendants, as the law arising on that evidence was in favour of the defendants; but that they were the sole judges of the credibility of wit-

(a) This case is overruled by *Ricks v. Yates*, 5 Ind., 115; 4 Id., 79; 3 Id., 107.

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nesses, and were not bound by the statements of the witnesses if they thought them untrue." The instruction thus refused, as well as that given, is complained of by the appellants. The first branch of the instruction given is in the very language used by the appellants themselves, and so far can not be objected to. Indeed, the instruction is a corollary of the law from the evidence we have noticed. The law is settled, and is not *controverted in this case, that if the [*25] contract was for a year's labor, at the rate of nine dollars per month, a recovery could not be had—the contract being entire—for a less period than that fixed by the parties, unless the contract was rescinded. *Cranmer v. Graham*, 1 Blackf., 406, and authorities cited. The second branch of the instruction seems to be equally unexceptionable. The proposition is undeniable, that it is the exclusive province of a jury to judge of the credibilty of witnesses; and, clearly, they are not bound by the statement of a witness, if they do not believe it to be true.

The second instruction complained of was given at the instance of the plaintiff below, and is as follows: "If the jury believe the defendants resorted to improper means and ungenerous conduct towards the plaintiff, to make him abandon his contract, he is entitled to recover for the labor done under the contract." The record shows that one of the defendants remarked, when told the plaintiff had quit work, that he was glad of it, for the plaintiff was worth nothing; and one witness thought *De Camp* manifested a disposition to get the plaintiff to leave him. This appears to be all the testimony upon which the instruction is founded, or which, in any degree, relates to "improper means and ungenerous conduct" used towards the plaintiff. The positive or implied rescission of a contract, is certainly different from improper means or ungenerous conduct, by one party to the other, to induce an abandonment of it. The question before the jury was, is the contract dissolved? If it was dissolved by the defendant, the plaintiff was entitled to recover. If it was not, the verdict should have been for the defendants. It is clear there was no

positive rescission; and if it was implied, it must have been from the improper means and ungenerous conduct used towards the plaintiff. These terms are vague and indefinite; and to adopt them as establishing the rule by which contracts are to be dissolved, would subject the rule to the operation of such uncertain tests as would render it entirely nugatory. What some juries would regard as improper means and ungenerous conduct, others might deem appropriate to the parties. A rule so important should have a more steady and settled foundation than that of sensibility.

In the case of *Marsh v. Ruleson*, 1 Wend. Rep., 514, in a contract of the nature of that before us, the Court, in [*26] relation *to some very offensive language used by the employer, said, that though the language was exceedingly improper, it did not amount to turning the plaintiff off.

It is true, one of the appellants said, when informed that *Stevens* had quit work, that he was glad of it, for he was worth nothing. But this was after the contract was voluntarily abandoned by *Stevens*, and he had thus waived a right to enforce its execution by the appellants. The contract was then abandoned; and agreeably to the case of *Lantry v. Parks*, 8 Cow. R., 63, an offer the following day to resume the work, if such had been made, would have left it to the election of the defendants below, either to accept the offer, or reject it and treat the original contract as rescinded. It would seem that a disposition to rescind a contract or to force the opposite party to abandon it, that threats or a declared purpose of rescinding, do not of themselves constitute a rescission.

We are therefore of the opinion, that the instruction last examined should have been refused by the Circuit Court; and that it should have granted a new trial.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

O. H. Smith, for the appellants.

J. Rariden, for the appellee.

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WATSON and Another v. WILLIAMS and Another.

CHATTEL MORTGAGE—POSSESSION BY MORTGAGOR—EVIDENCE.—An execution was levied on certain goods found in the possession of the execution-debtor. A third person claimed the goods under a mortgage, which had been previously executed to him in good faith by the execution-debtor, to secure the payment by a given time of a just debt. Nothing was said in the mortgage as to which of the parties should have possession of the goods. At the time the mortgage was executed, the goods were delivered to the mortgagee and were left by him with the execution-debtor, in whose possession they remained until the time of the levy.

Held, on a trial of the right of property, that the mortgagor's possession of the goods was not conclusive evidence of fraud as to creditors; but that his possession might be explained by parol evidence, and shown to be fair and consistent with the contract (*a*).

 ERROR to the *Vigo* Circuit Court.

STEVENS, J.—Trial of the right of property. An execution *of *fiери facias*, in favor of *Williams* and [27*] *Chase* against one *Jackson*, was levied on three pair of blacksmith's bellows, and other blacksmith's tools, as the property of said *Jackson*, being found in his possession. *Watson* and *Allen* claimed the property; and such proceedings were had upon the claim, that it was finally tried by a jury in the Circuit Court, and found to be the property of *Jackson*, and subject to the execution of *Williams* and *Chase*. *Watson* and *Allen* claim under a mortgage deed, in the usual and regular form of mortgage deeds, with a provision that if the said *Jackson* should well and truly pay and satisfy, on or before the 20th of *November*, 1833, a certain judgment due from him to them, the said *Watson* and *Allen*, for the sum of thirty-one dollars, &c., and also pay one note of seventeen dollars, &c., due from him to them, the said *Watson* and *Allen*, on or before the 20th of *January*, 1834, then the mortgage to be void, &c.

The record also shows that the mortgage was proved to have been made in good faith, and for value; that *Jackson* owed the money mentioned in the condition; and that it still remained

a See *Jones v. Gott*, 10 Ind., 240. See 1 G. & H., pp. 351, 352.

unpaid. It was also further proved, that, on the day the mortgage was entered into and made, the mortgaged goods were delivered to *Watson* and *Allen*, the mortgagees; and that they left them with the mortgagor, *Jackson*, where they remained until executed. The record further shows, that *Watson* and *Allen* then offered to prove and explain by proof, why they had thus left the goods with the mortgagor, and to show that such possession was not inconsistent with the mortgage, &c.; but the Court refused to admit the evidence to go to the jury. It further appears of record that the Court charged the jury, if the property in dispute remained in the possession of *Jackson*, after the execution of the mortgage deed, it was of itself evidence of fraud as to creditors, if that possession was inconsistent with the terms of the mortgage; and that the terms of the mortgage were absolute, and therefore the subsequent possession by the mortgagor could not be explained by any testimony offered.

The only question presented in this case is, whether the mortgagor's subsequent possession of the mortgaged goods can be explained by parol evidence, under the terms of the mortgage deed?

[28*] *This has long been, and it seems as if it would ever be, a vexed question. There is no doubt that the visible possession and control by the mortgagor or seller of goods and chattels, after he has thus mortgaged or sold his property in them, with the consent of the mortgagee or buyer, is evidence of fraud. That far the question is settled, both in *England* and *America*; but the great point of controversy is, whether the fraud which is thus to be inferred from the fact of possession, is an unconditional and absolute presumption of fraud; or whether the fact is only evidence of fraud, and is susceptible of explanation by proof to a jury?

In *England*, in the case of *Stone v. Grubham*, 2 Bulst. Rep., 225, it was held, that the subsequent possession of the vendor of a chattel was not fraudulent, if the bill of sale was conditional, for the payment of money, and the bill by its terms showed that the vendor was to retain possession until default

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was made. And in the case of *Bucknel v. Roiston*, Prec. in Chan. 285, a bill of sale of goods was given; and it appeared upon the face of the bill that it was given as collateral security, and that the vendor was to keep possession, &c.; the Lord Chancellor held that it was not fraudulent. Again, in the case of *Cadogan v. Kennett*, Cowp., 432, where household goods were transferred to trustees, it was held that those goods were protected from execution, although the grantor continued in possession. The court said that the transaction was fair, and that it was a part of the trust that the grantor should continue in possession. But in the case of *Worseley v. de Mattos & Slader*, 1 Bur. Rep., 467, Lord Mansfield strongly insists that there is no distinction between absolute and conditional sales; that a continuance in possession by a mortgagor was fraudulent at common law, and void by the statute of *Elizabeth*; and in that case it was held that a mortgage of goods, with the possession retained by the mortgagor, was fraudulent in law equally as it would be upon an absolute bill of sale. And finally in the case of *Edwards v. Harben*, 2 Term Rep., 587, the principle was emphatically settled, that if the vendee took an absolute bill of sale, to take effect immediately by the face of it, and the goods were left in possession of the vendor, it was in law a fraud *per se*; but that in all cases where that possession might be consistent with the face of the conveyance, the possession might be explained by proof.

[*29] *After this, the law appeared for many years to be permanently settled in that country; and it was repeatedly decided, that an absolute sale of chattels unaccompanied by possession was fraudulent in law, and void as to creditors; that the change of possession must be substantial and exclusive, and not concurrently with the assignor. Recently, however, the doctrine as it was then settled has been much shaken. The modern *English* decisions appear to establish a more lax rule; the courts now say that the question of fraud in such cases is a fact for a jury to determine; and that a continuance in possession by a mortgagor or vendor is only *prima facie* a badge of fraud; and that the presumption of fraud

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arising from that circumstance, may be rebutted by explanations showing the transaction to be fair and honest, and giving a reasonable account of the object of that possession; that the fraud thus arising is not an absolute inference of law, but one of fact for a jury. *Wooderman v. Baldock*, 8 Taunt., 676; *Kidd v. Rawlinson*, 2 Bos. & Pull., 59; *Cole v. Davies*, 1 Ld. Raym., 724; *Lady Arundell v. Phipps*, 10 Ves., 140; *Watkins v. Birch*, 4 Taunt., 823; *Jezeph v. Ingram*, 8 Taunt., 838; *Latimer v. Batson*, 4 Barn. & Cress., 652; *Leonard v. Baker*, 1 Maule & S., 251; *Steward v. Lombe*, 1 Brod. & Bing., 506; *Eastwood v. Brown*, Ryan & Moody, 312; *Reed v. Blades*, 5 Taunt., 212; *Storer v. Hunter*, 3 Barn. & Cress., 368.

In the Supreme Court of the *United States*, the doctrine as settled in *England*, in the case of *Edwards v. Harben*, is established. *Hamilton v. Russell*, 1 Cranch, 309; *United States v. Conyngham*, 4 Dall., 358; *Meeker v. Wilson*, 1 Gall. Rep., 419.

In the State of *Virginia*, the same principle has been directly and repeatedly settled. *Alexander v. Deneale*, 2 Munf., 341. It may, however, be proper to observe that in the case of *Land v. Jeffries*, 5 Rand. Rep., 211, the rule was qualified. In that case the Court held, that the possession of the vendor of goods and chattels is only *prima facie* fraudulent, and not such conclusive fraud, in any case, as to bar all explanation. But in the case of *Claytor v. Anthony*, 6 Rand. Rep., 285, the Court re-examines the whole doctrine, overrules the decision in the case of *Land v. Jeffries*, 5 Rand. Rep., 211, and ably maintains the rule established by the previous decision.

In *South Carolina*, the *English* rule, as established by the case of *Edwards v. Harben*, is declared by all the [*30] judges to be *the settled rule. *Kennedy v. Ross*, 2 Const. Rep., 125; *Hudnal v. Wilder*, 4 M'Cord's Rep., 294. In *Tennessee* the same rule is adopted. *Ragan v. Kennedy*, 1 Ten. Rep., 91. But in *Kentucky* the modern *English* rule is adopted. *Baylor v. Smithers' heirs*, 1 Littell's Rep., 105.

In *Pennsylvania* the general principle is emphatically recog-

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nized, that on an absolute sale or assignment of chattels, possession must accompany and follow the conveyance, and vest exclusively in the vendee, or it is fraudulent in law, though there be no fraud in fact; and in the case of a mortgage of goods an absolute delivery is requisite; the statement on the face of the mortgage, that possession is to be retained by the vendor, is not sufficient; that such a transaction is fraudulent *per se*. *Dawes v. Cope*, 4 Binn., 258; *Babb v. Clemson*, 10 Serg. & Rawle, 419; *Shaw v. Levy*, 17 Ib., 99; *Hower v. Geesman*, Ib., 251; *Clow v. Woods*, 5 Ib., 275; *Cowden v. Brady*, 8 Ib., 510; *Dean v. Patton*, 13 Ib., 345.

In *New Jersey*, *Connecticut* and *Vermont*, the same rule is rigidly adhered to. The delivery of possession, in the case of a sale or a mortgage of goods, is held to be necessary, if it be practicable; that there must be an actual and not a colorable change of possession; that on a sale or mortgage of chattels, an agreement either in or out of the conveyance, that the vendor may keep possession, is (except in special cases, and for special reasons, to be shown to and approved of by the Court) fraudulent and void, as to creditors and *bona fide* purchasers. *Chumar v. Woods*, 1 Hals. Rep., 155; *Patten v. Smith*, 5 Conn. Rep., 196; *Fletcher v. Howard*, 2 Aiken's Ver. Rep., 115; *Beattie v. Robin*, 2 Ver. Rep., 181.

In the State of *New York*, the question has been continually vibrating from side to side. In the cases of *Barrow v. Paxton*, 5 Johns. Rep., 258, and *Beals v. Guernsey*, 8 Ib., 446, the Court says, that the circumstance of the possession of goods not accompanying the sale or mortgage of them, is only *prima facie* evidence of fraud, and it may be explained. In the case of *Sturtevant v. Ballard*, 9 Johns. Rep., 337, the subject received a thorough discussion, and most of the authorities, both in *England* and *America*, were reviewed, and the *English* doctrine as settled in the case of *Edwards v. Harben*, adopted.

In the case of *Ludlow v. Hurd*, 19 Johns. Rep., 218, [*31] the Court said *that the question was unsettled and left it open for debate. And finally, in the case of *Bissell v. Hopkins*, 3 Cowen's Rep., 166, the doctrine estab-

lished in the case of *Sturtevant v. Ballard* was entirely overthrown. Afterwards, in the case of *Divver v. M'Laughlin*, 2 Wend., 596, the rule in the case of *Sturtevant v. Ballard* was again recognized. At this point the legislature of the State interfered, and in their late revised laws put the question at rest. They enacted, that unless the sale or assignment be accompanied by immediate delivery, and followed by an actual and continued change of possession, it shall be presumed to be fraudulent and void as against creditors, &c.; and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith, &c.

In *Massachusetts*, *New Hampshire* and *Maine*, it is settled that the retention of possession by the vendor of goods and chattels, after an absolute sale or a mortgage of them, is only *prima facie* evidence of fraud, and it may be explained by proof. *Brooks v. Powers*, 15 Mass. Rep., 244; *Bartlett v. Williams*, 1 Pick. Rep., 288; *Homes v. Crane*, 2 Ib., 607; *Wheeler v. Train*, 3 Ib., 255; *Ward v. Sumner*, 5 Ib., 59; *Shumway v. Rutter*, 7 Ib., 56; *Haven v. Low*, 2 New H. Rep., 13; *Coburn v. Pickering*, 3 N. Hamp. Rep., 415; *Reed v. Jewett*, 5 Greenleaf's Rep., 96; *Holbrook v. Baker*, 5 Ib., 309.

In *North Carolina*, the rule is much more relaxed; the whole subject, in all cases, is submitted to a jury, and very little weight is attached to the circumstance of possession in any case. *Vick v. Kegs*, 2 Hayw. Rep., 126; *Falkner v. Perkins*, Ib., 224; *Smith v. Neil*, 1 Hawk. Rep., 341; *Trotter v. Howard*, Ib., 320; *Howell v. Elliott*, 1 Badg. & Dev. Rep., 76. In 1830 the legislature of this State interfered, and have placed the subject on a more sure footing, by requiring a registry of all such mortgages, conveyances, &c., to make them valid.

We have thus run over and brought into immediate contact and view, the various leading adjudications in both *England* and *America* on this troublesome question; not so much for the purpose of attempting to extract from them any definite rule, as to show the difficulty that surrounds the question in

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all courts, and to show the vacillation and confliction exhibited in the decisions of the most august and profound [32] tribunals known to the world. The most enlightened and profound courts and jurists have failed, as yet, in establishing any fixed and satisfactory rule. This failure has not resulted from a lack of talents, learning or industry; and therefore we are forced to conclude, that the matter is not susceptible of being reduced to rules more certain or more satisfactory. Each case must, to some extent, stand upon its own circumstances; and these circumstances are as various and different as the transactions and ingenuity of men, and cannot, perhaps, be all reduced to any certain and fixed rule, without doing the most flagrant injustice to many.

All the adjudications may, perhaps, be properly ranked under two great general rules; but to these rules the exceptions are almost infinite.

A majority of the *American States*, as well as the Supreme Court of the *United States*, and also the decisions in *England* in the age of *Buller* and *Mansfield*, take the position that the question which is inferred from the subsequent possession of the mortgagor or vendor, devolves upon the Court; that it is an inference of law, and requires the opinion to be formed on the single circumstance of possession; and that no explanation is admissible. This rule was asserted in an explicit and decided manner in *England*, in the days of *Buller* and *Mansfield*; and has been sustained with greater precision, and more powerful and convincing arguments, by the aforesaid *American* courts. In support of that position, it is argued that there is the same reason for an inflexible rule of law, that a vendor of chattels shall not, at the expense of his creditors, sell them and yet retain the use of them, as there is for that much admired and inflexible rule of equity, that a trustee shall not be permitted to either buy or speculate in the trust fund; or for that other salutary and fixed rule, that the voluntary settlement of property shall be void against existing creditors; that such rules are made to destroy all temptation to fraud; that private sales and transfers of property and secret trusts between the

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vendor and vendee of chattels, are and may be of such a secret and private character, that it is impossible for the party aggrieved to show the fraud, although it may really exist; that human testimony is too infirm to ferret out and expose to view private and secret trusts; and that therefore the law ought to cut them off at the threshold, and bar the door against [*33] every *species of private trust or imposition, which from its nature might be inaccessible to the eye of the Court.

The other *American* decisions and the modern *English* decisions have established another rule, which is more lax and popular. By these decisions, the question of fraud is referred to the jury, the whole transaction is looked into, and every honest apology and explanation that the party can show is admitted. The argument used to sustain this rule is, that the retention of the goods by the vendor, after he has parted with his property in them, injures no one, unless a new credit be given, or an old one extended, under a mistaken belief that the goods belong to the vendor; and that the few cases of that kind which may ever happen, ought not to introduce so stern and inflexible a rule, as to make such conveyances void against every description of creditors; that no general good can grow out of such a rule; but that much injustice and hardship must often be the consequence of the exercise of it; and that the daily transactions, business, and dealings of men forbid it.

As was before remarked, the rule is settled by all the courts in both *England* and *America*, that if the mortgagor or vendor of goods retain the possession of them, after they are sold or mortgaged, with the consent of the mortgagee or vendee, such subsequent possession is, of itself, sufficient evidence of fraud as to creditors, unless that possession be explained, and shown to be fair and consistent with the sale or mortgage; but the great and interesting subject of difficulty is, in determining in what cases evidence can be received to explain such subsequent possession. In the case of *Jordan v. Turner*, 3 Blackf., 309, this Court gave a rule on that subject. The Court in that case said, that the presumption of fraud arising from subsequent

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possession might, in certain cases, be rebutted and explained by legal evidence; as in cases of conditional sales or mortgages; or in cases where it is a part of the original contract, that the vendor should retain possession until after default be made in the condition of the sale; or in cases where the situation of the parties or the goods is such, that immediate possession can not be taken. In all such cases, the possession by the vendor or mortgagor, after he has parted with his property in the goods, is consistent with the contract and may be explained by parol evidence. In that case the Court intimated a doubt,

whether any evidence could be received to explain
[34*] *the subsequent possession then under consideration;

but the doubt there arose from the language of the conveyance itself. The mortgage in that case at the close stated, that the goods and chattels mortgaged were *delivered to the mortgagee, bona fide, in his own right to possess, &c.* The subsequent possession in that case contradicted the face of the deed under which *Turner* claimed; and any evidence to explain must have contradicted the express terms of the deed, which can not be permitted in any case. We remain satisfied with the rule established in the case of *Jordan v. Turner*, and will proceed to apply it to the case now before us.

Watson and *Allen* claim under a mortgage, and the question is, could evidence be received to explain the subsequent possession of the mortgagor, without contradicting the terms of the mortgage deed; or in other words, does the subsequent possession of the mortgagor conflict with or contradict the terms of the mortgage deed? In absolute bills of sale, there is always a clause stating that the goods sold are delivered; but it is not so with mortgages. A mortgage is not an absolute sale; it is conditional, and only becomes absolute upon default being made; and it is usual for the mortgagor to retain possession until default. Anciently it was usual to insert a clause in the mortgage, that the mortgagor should retain possession until default; but Chancellor *Kent* says, that at this day that is not done; that the understanding and practice now is, that the mortgagor remains in possession until default is made, unless

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there is a contract to the contrary. Delivery and possession are essential to the validity of a pledge, but it is not so with a mortgage.

In the mortgage now before us, there is not one word about who shall have possession of the mortgaged goods; consequently, the subsequent possession of the mortgagor does not contradict the terms of the deed of mortgage. If then the after possession of the mortgagor does not contradict the terms of the deed, evidence may be received to explain that possession, and show that it was fair and consistent with the contract.

There is no evidence in this case showing that the mortgagor *used, traded on, or treated the mortgaged goods as his own*; nor is there any proof, that default had been made in the payment of the mortgage money, at the time the goods were seized and taken in execution: the only question [35*] *presented is as to the inference of law arising from the subsequent possession of the mortgagor (1).

We think the instruction of the Court to the jury was wrong; and for that cause the judgment must be reversed.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

E. M. Huntington, for the plaintiffs.

J. D. Taylor, for the defendants.

(1) Vide note to *Chinn v. Russell*, Vol. 2 of these Rep., 174; *Hankins et al. v. Ingols*, the present term, *post*; *Foley et al. v. Knight*, Nov. term, 1837, *post*; 2 Kent's Comm., 3d Ed., p. 512 to 536.

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RIGHT OF PROPERTY—AFFIDAVIT.—The claimant of goods, taken in execution against another person, filed a claim to the goods, stating them to be his and that his claim was just and legal, and then made an affidavit that the claim was true in substance and matter of fact. *Held*, that the affidavit was sufficient.

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SAME—WITNESS.—The execution-defendant, on a trial of the right of property between the claimant and the execution-plaintiff, is a competent witness for the claimant.

CHATTEL MORTGAGE—POSSESSION OF MORTGAGOR.—Whether goods mortgaged to secure a debt, but which are suffered to remain with the mortgagor after the time limited for payment, and are used by him as his own, can be taken on the execution of a third person against the mortgagor, depends on the question whether the mortgage was executed to defraud the mortgagor's creditors, which is a question for the determination of a jury.

SAME.—The possession and use of the goods in such case, are *prima facie* evidence of fraud; but the presumption of fraud thus raised may be rebutted by testimony showing the transaction to be *bona fide* (a).

APPEAL from the *Fayette* Circuit Court.

BLACKFORD, J.—An execution in favour of *Hankins* and *Mount* against *Weaver*, was levied on a spinning machine in *Weaver's* possession. *Ingols* filed with the justice, who had issued the execution, a claim to the machine as his property. He also filed an affidavit, stating that “the above claim was true in substance and matter of fact, to the best of his [*36] belief.” *The triors, under the statute of 1831, found the property to be *Weaver's* and subject to the execution. The justice entered a judgment on the verdict, and stated in his judgment that the property was valued, by agreement of the parties, at \$200. *Ingols* appealed to the Circuit Court.

A bill of exceptions shows that, on the trial in the Circuit Court, the claimant introduced, in support of his claim, a mortgage, as follows:

“This indenture, made the 25th day of *September*, 1833, between *Lewis S. Ingols*, of the county of *Franklin* and State of *Indiana*, of the one part, and *Philip Weaver*, of the county of *Fayette* and State aforesaid, of the other part, witnesseth, that the said *Philip Weaver*, for and in consideration of the sum of \$200, in hand well and truly paid by the said *Lewis S. Ingols*, the receipt whereof is hereby acknowledged, hath bargained, sold, released, granted and confirmed, and by these presents doth grant, &c., unto the said *Lewis S. Ingols* the

(a) See *Watson et al. v. Williams*, ante p. 26.

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following property, to-wit, one throstle and double carding machine, one drawing frame, and one roping frame, a reel and winding block, and some bobbins. To have and to hold the said goods, and every of them, by these presents bargained and sold, &c., unto the said *Lewis S. Ingols*, his heirs, executors, administrators, and assigns forever. Provided always, and it is hereby expressly agreed, that if the said *Philip Weaver*, his heirs, &c., shall well and truly pay unto the said *Lewis S. Ingols*, or his certain attorney, executors, &c., \$100, one day after date, and \$100 thirty days from the above date, then these presents and every clause and condition of them to be void, otherwise to be and remain in full force and effect. And it is further agreed, that the said *Philip Weaver* shall retain possession of the above goods, until default is made in the conditions above, and no longer.

“In presence of *Philip Weaver*, [Seal.]”
 “*A. N. Hammond*. *Lewis S. Ingols*, [Seal.]”

There is the following endorsement on the mortgage:
 “Received and recorded *January*, 21st, 1834, among the deed records of *Fayette* county, in Book F, pages 455, 456.

John Tate, R. F. C.

The claimant then offered *Weaver*, the mortgagor and execution-defendant, as a witness to prove “that the
 [*37] mortgage *was *bona fide* executed; and that the whole transaction was had between the witness and claimant in good faith.” The witness was objected to as being interested, but the objection was overruled.

The bill of exceptions further states, that after the evidence had gone to the jury on both sides, the defendants asked the Court to give the jury the following charge: “That if they believed that the mortgage, under which the plaintiff claimed the property in dispute, was executed in the county of *Franklin* at the day of its date, and that *Weaver*, the mortgagor and execution-defendant, brought the property to *Fayette* county more than a year ago, with the knowledge and assent of *Ingols*, used and occupied it as his own ever since up to the levy on

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the 1st of *January* last, made valuable additions and improvements upon it to half its original value, exercised general acts of ownership over it, and obtained the credit for the amount of the execution from *Hankins* and *Mount*, upon the faith of such possession and acts of ownership, they, the said defendants, having no knowledge of the said mortgage, or the claim of the plaintiff to said property, the mortgage not having been recorded, nor any other notice of it having been given to the defendants, the property is subject to the debts of the defendants, created under such circumstances; and that if the jury believe that such are the facts of this case from the evidence, they must find for the defendants, &c.” Which charge the Court refused to give in terms, but they said to the jury: “That such a state of facts is strong evidence of fraud, and, unrebutted, the jury should find for the defendants. But that, notwithstanding such facts, if it should have appeared to their satisfaction, that the property claimed named in said mortgage was purchased by said *Weaver* from said *Ingols*, the claimant, and that delivery of the same was made under such purchase to *Weaver*, and that the mortgage was executed in good faith, to secure the payment of the purchase-money in favour of said *Ingols* by said *Weaver*, the execution-defendant; and if the purchase-money is still unpaid, the jury should find for the claimant.”

The jury gave a verdict for the claimant, and the Court rendered a judgment thereon in his favour.

The first objection made to the proceedings is, that the affidavit is not sufficient. The statute requires an
[*38] affidavit, that *the claim is just and true, in substance and matter of fact. R. C. 1831, p. 237. The claim is, in this case, that *Ingols* is the true and legal owner of the property, and that his claim thereto is just and legal. The affidavit states, that “the above claim is true in substance and matter of fact.” We think that the affidavit is, substantially, in conformity with the statute (1).

The second objection is, that the value of the property should have been found by the jury. The statute requires the value

of the property to be found by the Court or jury (as the case may be), in order to ascertain whether a writ of error will lie in the case. Rev. C. 1831, p. 320. Here the Court informs us, that the defendants agreed that the property was worth \$200. That estops them now from any objection to the value.

The third objection is as to *Weaver's* admission as a witness for the claimant, to prove the validity of the mortgage. The witness does not appear to us to have had any direct interest in supporting the mortgage. In establishing the mortgage, the witness would rescue the property from the defendant's execution, but the property then must go to the claimant, and not to the witness. Even the witness' right to the temporary possession of the machine, as mentioned in the mortgage, had long before ceased to exist by the terms of the contract. The feelings of the witness may have been favourable to the claimant, but objections on that ground go only to the credibility of witnesses, and not to their competency. In a late case in *New York*, very similar to the one before us, the execution-defendant was examined as a witness on the part of the claimant, without objection. *Hall v. Tuttle*, 8 Wend. 376.

The fourth objection is, the refusal of the Court to give the instructions asked, and the giving of the instructions objected to.

The circumstances enumerated in the charge asked for, do not, *per se*, make the conveyance of the machine to the claimant fraudulent and void. The Court instructed the jury, "That such a state of facts was strong evidence of fraud, and, un rebutted, the jury should find for the defendants." This was all that the Court could say. Whether the mortgage was made with an intent to defraud the defendants, as the creditors of the mortgagor, was the question to be tried. It was a question of fact, which the parties had submitted for

[*39] trial to a jury. *The claimant had a right to meet the evidence of the defendants by other evidence of his own, and to show that, notwithstanding the facts proved on the other side, the mortgage was *bona fide*, and the mortgagee free from any imputation of fraud. Let the circum-

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stances of *Weaver's* taking the machine into another county, his making improvements on it, using it as his own, and obtaining credit from the defendants in consequence of these acts, raise ever so strong a presumption against the fairness of the mortgage, it is, after all, no more than a presumption, and the facts raising it must be subject to be rebutted and explained. Besides, it is not pretended that any of these acts, except the removal of the machine, were done with the knowledge or consent of the claimant.

The Court instructed the jury, in substance, as follows: That if the facts as already mentioned, stated in the charge which was refused, were unrebutted by other testimony, the jury should find for the defendants; but that, if the mortgage was *bona fide*, and the debt unpaid, they should find for the claimant. The defendants had no right to complain of these instructions, nor to ask for any other on the subject more favourable to their side of the cause.

There is a very late case in *New York* to which we have already referred, which is the same in principle with the one now under our consideration. That case takes a full view of the question before us, and will be found to contain a statement of most of the decisions respecting it. The Chief Justice, as the result of his investigations, makes use of the following language: "The rule, as I understand it, is, that possession by the vendor, or mortgagor after forfeiture, is *prima facie* evidence of fraud; but that such possession may be explained, and if the transaction be shown to have been upon sufficient consideration, and *bona fide*, that is, without any intent to delay, hinder or defraud creditors or others, then the conveyance is valid, otherwise not. *Hall v. Tuttle*, 8 Wend., 375, 378.

There is also an important decision in *Massachusetts* of a very late date, relative to this subject. It is, indeed, nearly the same, not only in principle, but in the circumstances, with the one which we have now to determine. It is the case of an innkeeper, who had sold the furniture of his tavern to a friend, and was permitted to continue in possession. The

[*40] *Court in that case, after explaining another point, says: "But the vendor was allowed to re-possess himself of the furniture, and remove it into another house, in another town and county, and to use and claim it as his own, without any contract with the vendees. This circumstance necessarily created suspicion and difficulty. Persons dealing with the vendor, who, in his own name, occupied a public house with this furniture in it, would naturally consider him the owner, and would probably trust him on that account. If the statute of *James* were in force here, there is no doubt but that the furniture would be deemed the vendor's; for he had the entire order and disposition of it. But that statute is a branch of the bankrupt system, and is not applied, even in *England*, except in cases affected by that system. There was a similar provision in the bankrupt law of the *United States*. With us," continues the Court, "the possession and use of chattels by the vendor, after a perfect transfer, is only evidence of fraud, and may be explained to be consistent with the fairness of the sale." *Shumway v. Rutter*, 8 Pick., 443, 447.

We are aware, that the cases of *Edwards v. Harben*, 2 Term Rep., 587, *Hamilton v. Russell*, 1 Cranch, 309, and *Sturtevant v. Ballard*, 9 Johns. Rep., 337, are of a different complexion from those upon which this opinion is founded. But the latest decisions in *England*, and in many of the States of our own country, are in accordance with our opinion in the present case. Chancellor *Kent*, who, in *Sturtevant v. Ballard*, had followed the decisions in *Edwards v. Harben* and *Hamilton v. Russell*, gives up the point in the second edition of his Commentaries, so far as the late *English* authorities are concerned. The following is his language: "The conclusion from the more recent *English* cases would seem to be, that though a continuance in possession by the vendor or mortgagor be *prima facie* a badge of fraud, if the chattels sold or mortgaged be transferable from hand to hand, yet the presumption of fraud arising from that circumstance, may be rebutted by explanations showing the transactions to be fair and honest,

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and giving a reasonable account of the retention of possession." It appears to us, from a consideration of the *American* decisions, as well as of those in *England*, that we are warranted in coming to the same conclusion.

[*41] *A particular review of all the cases, both in the *United States* and in *England*, on this subject of sales of goods, as affected by fraud, may be seen in the distinguished work to which we have already referred. 2 Kent's Comm., 2d ed., p. 512 to 535.

We are confident that the authorities which we have now mentioned are entirely sufficient to show that the Circuit Court, in the case before us, committed no error, either as to the instructions refused, or as to those which were given.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

O. H. Smith, for the appellants.

J. Ryman, for the appellee.

(1) The affidavit of the claimant must now be in a different form. Vide Stat. 1834, p. 195. *Humble v. Williams*, May term, 1838; *Norris v. Detar*, Nov. term, 1838; Rev. Stat. 1838, p. 490.

TAYLOR v. MEEK, in Error.

IN a suit by *Meek* against *Taylor*, in the Circuit Court, the following note was filed, instead of a declaration, as the cause of action :

"On or before the 27th of *June* next, I promise to pay *George Meek* the sum of \$150, for value received of him, as witness my hand this 18th of *August*, 1832. *Henry Taylor*. For which said *Meek* agrees to take thirty-five head of second rate calves, to be delivered at my house in payment of the above note, provided said *Taylor* delivers them against the first of *April* next, otherwise the above note to remain in full force and virtue in law. 18th *August*, 1832. *George Meek*."

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Held, that in consequence of the agreement subjoined to the note and signed by *Meek*, the case is not within the statute which dispenses with a declaration in certain cases. Stat. 1833, p. 112 (1). Vide *Dowdel v. Aston*, 3 Blackf., 406.

(1) Accord, Rev. Stat. 1838, p. 458.

[42*] TRIMBLE and Others v. THE STATE on the relation of S. HOBAUGH.

PENAL BOND—INTERPRETATION OF.—The condition of a penal bond executed by *A* and another, recited that *A* had been adjudged by the court to be the father of a bastard child, of which *H* was the mother, and had been ordered by the court to pay a certain sum to the mother, and certain other sums to the clerk of the court for the use of the person who should afterwards support the child, and then stated that if the several sums should be so paid the bond should be void, otherwise in force. *Held*, that the bond thus taken to secure a compliance with the order of the court, is authorized by the statute.

SAME—PLEADING AND PRACTICE.—If a declaration in such a case, setting out the condition and assigning breaches, be demurred to and the demurrer be sustained, the judgment on demurrer should be interlocutory only; and the truth of the breaches and the amount of the damages should be determined by a jury. After that, final judgment may be rendered for the penalty with costs, and execution be awarded for the damages assessed with costs.

SAME.—If, in a suit brought by the State, on the relation of a *feme sole*, the relator's subsequent marriage be suggested and the plaintiff recover, the judgment should be for the State, on the relation of the husband and wife.

ERROR to the *Delaware* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by the State, on the relation of *Susan Hobaugh*, against *James Trimble*, *John Marshal*, and *John Trimble*. The foundation of the action is a bond in the penalty of \$300. It is recited in the condition of the bond, that *James Trimble* had been adjudged by the Circuit Court to be the father of a bastard child, of which *Susan Hobaugh* was the mother, and that the Court had ordered him to pay a certain sum to the mother, and certain

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other sums to the clerk of the court for the use of the person who should afterwards support the child. The condition of the bond, after this recital, states that if the several sums of money should be paid agreeably to the order of the Court, the bond to be void, otherwise to remain in force. The declaration assigns as a breach of the condition, the non-payment of the money payable by the order to *Susan Hobough*, the relator.

After the filing of the declaration, the plaintiff entered a suggestion on the record that *Susan Hobough*, the relator, had married one *Anderson Longacre* since the last continuance of the cause.

The defendants craved *oyer* of the bond and condition, and then demurred generally to the declaration.

[*43] *The Circuit Court overruled the demurrer, and entered a final judgment against the defendants for the penalty of the bond, together with the costs of suit.

The plaintiffs in error contend that the bond declared on is not authorized by the statute, and can not therefore be the foundation of a suit. The statute says that the person adjudged to be the father of the child shall stand charged with the maintenance of it, in such sums as the Court shall order, and that the Court shall require the father to give security to perform the order. Rev. Code, 1831, page 286 (1). It appears to us, that this statutory provision warrants the taking from the reputed father and his sureties, such a bond as the one before us, as a security for a compliance with the order of the Court. The demurrer to the declaration was, therefore, correctly overruled.

There is an error, however, in the rendition of a final judgment for the penalty of the bond, immediately upon the overruling of the demurrer. The judgment on demurrer should have been in the nature of an interlocutory judgment only; and the truth of the breaches should have been determined, and the damages assessed, by a jury. After that, final judgment could have been rendered for the penalty with costs, and execution awarded for the damages assessed with the costs. See *Glidewell v. M'Gaughey*, 2 Blackf., 360.

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There is also an error in the judgment, as to the name of the relator. The plaintiff had suggested on the record, as prescribed by the statute in such cases, the marriage of the relator since the last continuance of the cause. The judgment should have conformed to that suggestion, and been in favour of the State, on the relation of *Anderson Longacre* and *Susan*, his wife.

The judgment must be reversed, and the proceedings subsequent to the overruling of the demurrer set aside, at the costs of *Anderson Longacre* and *Susan*, his wife.

Per Curiam.—The judgment is reversed, &c., at the costs of the relators. Cause remanded, &c.

J. Rariden and *J. S. Newman*, for the plaintiffs.

C. B. Smith and *D. Kilgore*, for the defendant.

(1) Vide Rev. Stat., 1838, p. 330 to 333.

[*44]

*DICKERSON v. HAYS.

DEFECTS IN COMPLAINT—VERDICT CURES.—If a good cause of action be stated in the declaration, though it be defectively stated, a general verdict for the plaintiff cures the defect. *Aliter*, if the declaration contain no valid cause of action.

SAME—AWARD.—An award in the plaintiff's favour cures the same defects in the declaration, which would be cured by a verdict.

ARBITRATION AND AWARD.—The want of notice of the time and place of the meeting of the arbitrators is no objection to an award, provided the party appeared and was heard before the arbitrators.

SAME.—The arbitrators to whom a cause pending in the Circuit Court is referred need not be sworn.

SAME—PRACTICE.—In the case of such a reference, the award must be filed, approved of by the Court, and recorded, and a *scire facias* be issued, &c., before the rendition of judgment on the award (a).

(a) As to common law arbitrations, see *Francis v. Ames*, 14 Ind., 251; 9 Id., 270; 20 Id., 421.

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ERROR to the *Hancock* Circuit Court.

STEVENS, J.—*Hays* declared against *Dickerson* in an action of trespass on the case upon promises. Plea, non-assumpsit, and issue joined to the country. After the issue was joined it was ordered by the Court, by and with the consent of the parties, that the matters in difference in the said cause, be submitted to the final arbitrament and award of *Bethuel F. Morris*, *Thomas Tyner* and *William Quarles*, who should make their award during that term of the Court; that the award should be made the judgment of the Court; and that the parties should waive all formality as to notice or rule. On the same day the arbitrators made their award under their hands and seals in favour of the plaintiff, returned it into Court, and judgment was rendered by the Court upon it.

The record shows that the parties and their attorneys were present before the arbitrators when they made their award, and submitted their evidence and statements to them for their determination; but it is not shown that the parties were present when the award was returned into Court, or when the judgment was rendered upon it by the Court.

To the judgment and proceedings in this cause several objections are raised.

The first error alleged is, that the declaration is defective in the allegations respecting both the contract and the consideration. This objection, if it had been taken at the proper time and in the proper manner, would have prevailed.

The declaration as to these statements is uncertain [*45] and defective, but the *objection to them comes too late; the insufficiencies are all such as are cured by a general verdict. The doctrine is now settled, that if there is a cause of action stated, although it may be ambiguously, inaccurately, and defectively stated, yet a general verdict cures the defects; because it will be presumed that all circumstances, both in form and substance, necessary to complete the cause of action thus defectively stated, were proved at the trial. But where there is no cause of action stated, as in cases of this kind, if the contract or the

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consideration be entirely omitted, the omission is not cured; for the party could not be allowed to prove that which he had entirely omitted to state, and therefore no presumption in his favor could arise. In this case there is a contract and consideration both stated; and the presumption arises that the deficiencies of the allegations were helped out by the proof. It is true that there was no verdict of a jury in this case; but there is that which makes a stronger case in favour of the declaration than a verdict of a jury would make. No objection whatever was made to the declaration, but an issue was joined to the country on the plea of non-assumpsit, and the matters in dispute in the cause of action referred to arbitrators, who brought in a general award in favour of the plaintiff.

There are several other objections raised to the declaration, some of which, if they had been taken at the proper time and in a proper manner, might have been available; but as it is they come too late.

The next errors assigned are in reference to the arbitration, award, and judgment. They are, that the arbitrators were not chosen either in court or out of court by bond and submission; and that there was neither time nor place fixed for their meeting, nor notice given of the time and place at which they did meet. No error as to these particulars exists. The arbitrators were chosen in open court, and a rule of reference entered, the form and substance of which are sufficient. 1 Blackf., 433, appendix. And the record shows that the award was made and returned into court during the same term, and that the parties both in their own proper persons and by their attorneys appeared before the arbitrators and introduced their evidence, &c. The object of notice of the time and place of meeting was attained by some means; the parties appeared and were heard, and that cured all error as to that notice.

[*46] *Many other exceptions are taken to the award, and the proceedings upon the reference and award, &c.; none of which are even plausible except the following:

The record does not show that the arbitrators were sworn. In support of this objection the case of *Jacobs v. Moffatt*,

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decided by this Court at their *May* term, 1834, is relied on. That case will not sustain the position assumed. The Court in that case says expressly that the question is not decided. In the case of *Jacobs v. Moffatt*, the Court noticed the fact respecting the oath, simply for the purpose of showing, that our statute regulating arbitrations in the Circuit Court, like the *English* act of the 9 and 10 Will., 3, requires no oath. And the Court in that case said, that if an oath were necessary, it need not appear upon the record, that it could be proven *aliunde*, unless the statute required it to appear of record. That case leaves the question open, although a strong intimation is given that no oath is necessary. At common law no oath is required; the statute requires none, and therefore we think that an oath is unnecessary.

The next and last objection which we shall notice, is, that the defendant against whom the award was rendered, had no day allowed him in court after the report of the award, but that final judgment was rendered on it without a *scire facias*, &c. This objection must prevail. The judgment in this case can not be sustained by either the *English* practice at common law, or under their statute, nor by our practice or our statute.

The *English* practice is this: At common law, where a cause is depending, the submission may be made a rule of court before the trial, or even after it has commenced, by order of *nisi prius*; and in such cases the non-performance of the award is a contempt of the court, and obedience will be enforced by attachment. This interposition of the court is not, however, a matter of course. In order to proceed by attachment, the award must be filed and a copy served on the opposite party, and a demand made of him to perform the award. After thus serving a copy of the award, and after such demand and refusal, the court will, on proof of these facts by affidavit, grant a rule for an attachment *nisi*, which will afterwards be made absolute, on affidavit of due service of the rule, if no sufficient cause be shown to the contrary. This common law

[*47] practice is not interfered with in *England* by *their statute of 9 and 10 Will., 3. That statute simply

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extends, under certain rules, restrictions, and proceedings, the same privileges to parties out of court, where no suit has been commenced. Lord *Mansfield* held that the act was only declaratory of what the law previously was, in cases where there was a suit pending in court, and extended it to cases where there was no suit brought.

In *England* in all cases of reference, whether at common law in cases where a suit is pending, or under the statute in cases where no suit is brought, if either party neglect to perform the award, recourse may be had to an action upon the submission or the award; or the party may proceed to have a performance enforced by attachment. But neither at common law, nor under the statute, can an attachment issue, until after the award is filed, a copy served, a demand and refusal of performance made, &c., all of which must be proved to the Court by affidavit, and the rule for an attachment is then only *nisi*, &c., at first.

In this country, under our statute and practice, the proceedings are in some particulars different from the *English* practice. In *England*, neither at common law nor under their statute, can the Court render a judgment on an award; but they may, if proceedings for that purpose be had, enforce a performance by an attachment; but under our statute and practice, the performance of an award is never enforced by attachment. If the party do not choose to have recourse to an action on the submission or the award, he may, if the award is for the payment of money, take proceedings to have a performance enforced by rendering a judgment in the proper Court against the party for the amount of the award; on which judgment, the various writs of execution may issue as on any other judgments. Our statute provides for the rendition of judgments upon awards in cases of reference, where there is no suit pending as well as in cases where there is; but the proceedings in the two cases are in many particulars different.

In cases like the present, where the reference is by a rule of Court of a suit pending, it is expressly required that the

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award or report shall be made according to the submission, be approved of by the Court, and entered upon their records, and then it shall have the same effect, and be deemed and taken to

be as available in law, as a verdict given by twelve
[*48] men; *on which the Court shall render judgment, on
scire facias, for the recovery thereof, &c. The act

also provides that in all cases of reference, whether made by rule of Court in a cause pending, or otherwise, either party shall be at liberty to introduce evidence to either substantiate or invalidate the award, &c. From these enactments it clearly appears, that the legislature intended that the parties should have a day in Court after the award is made and returned; and in cases of reference by a rule of Court where a cause is pending, the party shall be brought in to show cause, &c., by a writ of *scire facias*, &c. This is a very wise and salutary provision. Arbitrators, although chosen by the parties, and put in their place and stead to act for them, as agents with full powers, are yet mere men, and are subject to the like weakness, infirmities, and passions that other men are; and sitting as they do without any third and disinterested tribunal to watch over them, advise, counsel, and instruct them, they are liable to commit errors, to make mistakes, to misunderstand, and even to be corrupted. If their awards were made absolute and final, without giving the parties a day to be heard, &c., the most palpable injustice would often be done. The subtle and crafty knave could often accomplish his fraudulent designs and tricks, by alluring his honest, uninformed, and unsuspecting adversary into an arbitration.

The terms of the contract in these cases settle the question without any difficulty. What is the contract the parties enter into under a rule of reference like the present? It is, that the Court shall render judgment for the amount which shall be awarded, or in other words, that the party against whom the award is rendered will confess judgment for the amount. The parties do not bind themselves to pay down the money. A performance then of the contract in the submission is a confession of judgment for the amount awarded. If the party

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should not do that, and the other should wish to enforce a performance, he must file the award, have it approved by the Court, recorded, and issue a writ of *scire facias*, &c. In this case, the record does not show that the award was filed or that the Court approved of it, or that it was recorded; nor does the record show that any *scire facias* issued, or that the party was present at the rendition of the judgment. If the record showed that the party was present when the judgment [*49] was rendered *this Court would, perhaps, under the circumstances, presume that he confessed, unless it were shown that he objected to the proceedings (1).

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the report of the arbitrators set aside, with costs. Cause remanded, &c.

J. H. Scott, for the plaintiff.

C. Fletcher, for the defendant.

(1) For the *Indiana* statute on arbitrations, referred to in the text, see Rev. Code, 1831, p. 72. The act of 1838 is the same with that of 1831. Rev. Stat., 1838, p. 69. ,

THE STATE v. JACKSON.

CRIMINAL LAW—INDICTMENT.—An indictment against a person for selling spirituous liquors to an Indian, cannot be objected to merely because the name of the Indian is not inserted, if the indictment state that the name is unknown to the jurors.

ERROR to the *Allen* Circuit Court.

BLACKFORD, J.—Indictment against the defendant for selling spirituous liquors to an Indian. The indictment was quashed on motion of the defendant.

The indictment contains several counts. One of the counts states that the jury on their oath find: That the defendant (naming him), on, &c., at, &c. (stating the time and place), sold and disposed of a quantity of spirituous liquor, to wit: a

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pint of whiskey of the value of ten cents, to an Indian of this State, of the Miami nation of Indians, the name of which said Indian, to the jurors aforesaid is wholly unknown, contrary to the form of the statute and against the peace of the State.

We are at a loss to conceive what objection could be taken to this count of the indictment. The statute of 1832 states the offense described in the indictment to be an indictable one (1). Perhaps it may have been supposed that the name of the Indian should have been stated. The indictment, however, states the name to have been unknown to the jury, which is a sufficient reason for not inserting the [*50] name. An indictment for the murder of a stranger, or for larceny from the person of a stranger, stating the name to be unknown to the jury, cannot be objected to because the name of the stranger is omitted. Archbold's *Crim. Pleading*, p. 11.

We see no objection to the count to which we have referred; and the judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. Herod, for the State.

D. H. Colerick, for the defendant.

(1) *Accord. Rev. Stat.*, 1838, p. 223.

DAVIS v. HUBBARD & Co., in Error.

AN unincorporated company cannot sue in the name of the firm. See *Hays et al. v. Lanier et al.*, 3 Blackf., 322, and note. *Hughes v. Walker et al.*, the present term, *post*.

Hughes v. Walker, Carter & Co.

HUGHES v. WALKER, CARTER & CO.

UNINCORPORATED COMPANY—PARTIES TO SUIT.—If an unincorporated company sue in the name of the firm, the suit will be dismissed on motion (a).
SAME—PRACTICE.—When a suit is properly brought by the persons composing the firm of *A & Co.*, and a note payable to the firm is filed as the cause of action, the plaintiffs should enter a suggestion on record, that the promise was made to the plaintiffs by the name of *A & Co.*

ERROR to the *Allen* Circuit Court.

BLACKFORD, J.—An action of assumpsit was brought before a justice of the peace, in the name of *Walker, Carter & Co.*, as plaintiffs, against *Hughes*. The judgment of the justice is, “That the *plaintiffs* have judgment against the defendant for twenty-seven dollars, with costs.” *Hughes* appealed to the Circuit Court. The judgment in the Circuit Court [*51] is, “that the *plaintiffs* *recover of the defendant the sum of twenty-eight dollars in damages, with costs.

The only evidence in the cause was, that the firm of *Walker, Carter & Co.*, in the name of which firm the suit was brought, was composed of four persons, to wit: *George B. Walker, Chancy Carter, Joseph Holman* and *Anthony L. Davis*; and that the defendant had executed the note on which the suit was founded.

The defendant moved the Court to dismiss the cause on the ground that it was brought in the name of the firm, when it should have been brought in the names of the individuals composing the firm. This motion was overruled.

There can be no doubt but that the suit ought not to have been sustained. The right to sue, if there was any, was in four persons, and the action was brought by two of them only; and even the christian names of those two are not mentioned. The plaintiffs supposed that they might sue in the name of the firm. That, however, was a mistake. An unincorporated company can only sue in the names of the individuals who compose the company. 1 Chitt. Plead., 12.

(a) *Barrackman v. Worthington*, 5 Blackf., 213; 6 Id., 277.

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There is another ground on which the judgment must be reversed. The record does not show that there was any note, or anything else, filed to show the cause of action. But even supposing a note payable to *Walker, Carter & Co.*, had been filed, that circumstance would not have been sufficient. The statute authorizing a note to be filed as the statement of demand, can not intend that a note shall, of itself, be a sufficient statement in cases like the present, where the note does not show the names of the persons to whom it is payable. If the suit had been brought by the persons composing the firm, and the note had been filed with a suggestion on record that the promise was made to the plaintiffs by the name of *Walker, Carter & Co.*, the objection here noticed would not have existed (1).

Per Curiam.—The judgment is reversed with costs. To be certified, &c.

D. H. Colerick, for the plaintiff.

H. Cooper, for the defendants.

[*52] * (1) Vide *Evans et al. v. Shoemaker*, Vol. 2 of these Rep., 237; R. Code, 1831, p. 301; *Vandagriff v. Tate, et ux.*, Nov. term, 1836; Rev. Stat., 1838, p. 367, 368. As to the cases commenced in the *Circuit Court*, in which a declaration may be dispensed with, vide *Taylor v. Meek ante* p. 41. Rev Stat., 1838, p. 458.

IRVING v. M'LEAN and Another.

DISTRIBUTION—LEX DOMICILLI.—The distribution of the personal property of an intestate, wherever it may be situated, is governed by the laws of the country of his domicile at the time of his death.

FOREIGN STATUTE—JUDICIAL NOTICE.—The Courts of this State do not take notice of the statutes of another State, unless they be specially pleaded.

APPEAL from the *Union Circuit Court*. A bill in chancery was filed in the *Union Circuit Court* by *Benjamin and Hannah M'Lean* against *James Irving*. The facts, as shown by the bill, answer and depositions, so far as concerns the opinion of the Court, are as follows:

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John M'Lean, resident in the State of *Pennsylvania*, died there a few years ago intestate, being possessed of considerable personal property, and leaving the complainants his heirs at law. The defendant, as an executor *de son tort*, obtained possession of the property belonging to the estate, and converted it to his own use. He also recovered a judgment in this State for a debt due to the intestate, the amount of which was paid into the clerk's office of the *Union Circuit Court*.

The complainants, for the amount, &c., thus received by the defendant, filed this bill and obtained a decree.

STEVENS, J., after stating the facts in the cause, delivered the following opinion of the Court:

Numerous objections are raised in this case, and divers errors assigned, but this opinion will be confined to one. We are met at the threshold by an objection which renders all further investigation useless.

The complainants in the original bill have not shown that they are entitled to any relief. They claim as the children and heirs of *John M'Lean*, deceased, and the record expressly shows that the domicile of the intestate and his family was in the State of *Pennsylvania*, that he died there, and that the executor *de son tort* seized and possessed himself of [*53] the *personal estate of the deceased in that country; hence, the laws of that State must govern the rights of the complainants.

Judge *Kent* says: "It has become a settled principle of international jurisprudence, and one founded on a comprehensive and enlightened sense of public policy and convenience, that the *disposition, succession to, and distribution of* personal property, wherever situated, is governed by the law of the country of the owner's or intestate's domicile, at the time of his death, and not by the conflicting laws of the various places where the goods happened to be situated." "Personal property is subject to that law which governs the person of the owner. *Huberus* lays down this to be the correct and common opinion." *Bynkershoeck* considers the principle so

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well settled that none dare dispute it. *Vattel* thinks the rule to be well established by the laws of nations. 2 Kent, 429.

This doctrine is also settled in *England* in the cases of *Thorne v. Watkins*, 2 Ves., 35; *Pipon v. Pipon*, Amb. Rep., 25; *Burn v. Cole*, Ib., 415; *Bruce v. Bruce*, 2 Bos. & Pull., 229, note; *Bempde v. Johnstone*, 3 Ves., 198; *Somerville v. Lord Somerville*, 5 Ves., 750.

The rule as settled in *England*, and by the general usage of nations, as to succession and distribution of real and personal property, has been repeatedly declared to constitute a part of the municipal jurisprudence of this country. 2 Kent's Comm., 2 Edit., 432; 3 Cranch's Rep., 319; 7 Ib., 115; 9 Wheat., 565; 1 Binn., 336; 3 Johns. Ch. Rep., 210; 4 Ib., 469; 9 Mass., 337; 1 Mason's Rep., 408; 1 Const. S. C. Rep., 292; 4 Greenl. Rep., 134.

It is a rule about which there is no controversy, that courts of justice cannot judicially take notice of foreign laws; they must be specially pleaded. Whether the complainants in this case are entitled to relief, or have any interest in the money in controversy, depends solely upon the laws of *Pennsylvania*, and it is a question of law for the Court to decide; and therefore the bill should have averred their rights under the laws of that State, and should have set forth the law on which they relied, to enable the Court to determine whether they are entitled to any relief in the premises or not (1). There are other defects in the original bill which might, perhaps, have been reached by a proper demurrer. It is even left doubtful, in what character the complainants intend to charge *Irving*, whether as executor or as a trespasser. He is neither
 [*54] called *upon to account or pay; the whole frame of the bill is unapt, and lacks many important averments.

Per Curiam.—The decree is reversed with costs. Cause remanded, with directions to the Circuit Court to dismiss the bill, &c.

J. Perry and *S. Bigger*, for the appellant.

J. Rariden, for the appellees.

Evans v. Adams and Another.

(1) Vide *Stout v. Wood*, Vol. 1 of these Rep., 71; *Elliott et al. v. Ray*, 2 Id., 31, and note; *Cone v. Cotton et al.*, Id., 82, and note; *Titus v. Scantling et ux.*, 3 Id., 372; *West et al. v. Blake*, November term, 1836, *post*.

The printed statute books of this State, and of the late territories of *Indiana* and *Illinois*, purporting to be printed under the authority of the State or territory, are *evidence* of the private acts therein contained. And the printed statute books of any other State or territory of the *Union*, purporting to be printed under the authority of such State or territory, are *prima facie evidence* of the public and private acts contained in them. Stat. 1834, p. 79; Rev. Stat. 1838, p. 273.

EVANS v. ADAMS and Another.

EXECUTORS AND ADMINISTRATORS—LIABILITY ON APPEAL BOND.—An administrator, in the case of an appeal from a judgment against his intestate, executed an appeal-bond. The appellee obtained a judgment on the appeal, to be levied of the intestate's goods. In an action on the appeal-bond, the defendant proved that the estate, at the time of the judgment on appeal, was insolvent. *Held*, that the plaintiff could not recover.

SAME.—*Quære*, whether an administrator, who appeals from a judgment against his intestate, need execute an appeal-bond; or whether such bond, if executed, be obligatory?

ERROR to the *Owen* Circuit Court.

BLACKFORD, J.—This suit was commenced before a justice of the peace. It is founded on an appeal-bond executed by *Adams*, administrator of *Wilson*, and by *Shepherd*, conditioned for the payment of the judgment and costs, in a case in which *Adams*, administrator of *Wilson*, was plaintiff and *Evans* was defendant, should the suit be decided against the plaintiff.

There are three pleas: 1st, *nil debet*; 2d, no consideration; 3d, no assets.

The evidence in the cause was as follows: 1st, The appeal-bond. 2d, The record of the cause on the appeal, showing a judgment in favour of *Evans* for sixty-nine dollars and costs; to *be levied of the goods of *Wilson* in the hands of the administrator, if the administrator had so much to be administered. 3d, The insolvency of the

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estate of *Wilson* at the time of the judgment. 4th, That the suit in which the appeal-bond was given had been commenced by *Wilson*; and that after his death, it was dismissed for the insufficiency of the appeal-bond, and was afterwards reinstated in the name of *Adams*, administrator of *Wilson*, upon the execution of the bond now in question.

The judgment of the Circuit Court, upon this evidence, was for the defendants.

The statement of this case shows, at once, that the judgment of the Circuit Court is right. The judgment in the appeal cause is not against *Adams* personally. It was, by express terms, to be of no benefit to *Evans*, unless as to the unadministered goods of *Wilson*, and the proof is, that there were no such goods.

There may be some doubt whether an appeal-bond, given by an executor or administrator, be obligatory. The case is similar to that where a bond for security for costs is required of a non-resident plaintiff, and the only ground on which such a bond is ever required of an executor is the possibility of his becoming liable for costs *de bonis propriis*. There is a case, indeed, in which it is said that a bond for security for costs ought not to be required of a non-resident administrator. *Goodrich v. Pendleton*, 3 Johns. Ch. Rep., 520; but there is also a decision that a bond, in such case, should be given. *Chevalier v. Finnis*, 1 Brod. & Bing., 277.

There is a case in which the Court says that an administrator is not obliged to execute an appeal-bond. *Jackson's administratrix v. Henderson*, 3 Leigh, 196. The last case cited was just such a one as that in which the bond before us was required. The appellant had died pending the appeal, and the suit was revived by his administratrix. The appellee then moved to dismiss the appeal on account of the insufficiency of the appeal-bond given by the intestate. The Court overruled the motion, saying that the administrator could not be required to give security, and that the cause should proceed without a new bond, although the intestate's bond were defective. The Court mention some other objections to the dismissal, but the

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point, as above stated, is decided. If that case is correct, the bond on which the suit before us is founded was taken [*56] *without authority, and is not obligatory. That, however, is going further than we are required to go on the present occasion.

All the Circuit Court has decided is, that on an appeal-bond of an administrator, given in an appeal from a judgment against his intestate, the administrator and his sureties are not liable *de bonis propriis*, where the judgment on appeal is to be levied only of the intestate's goods. That judgment is correct.

Per Curiam.—The judgment is affirmed, with costs. To be certified, &c.

C. P. Hester, for the plaintiff.

I. Naylor, for the defendant.

TRACY v. REED, on Appeal.

ASSUMPSIT. Two counts: One on a special contract, the other for money had and received.

Plea in abatement to the first count, that prior to the commencement of the suit, the plaintiff sued the defendant in assumpsit before a justice of the peace; that the defendant pleaded in bar the same contract on which this count is founded, and averred performance; that the defendant obtained a judgment in that suit for ten dollars, and the plaintiff appealed, which appeal is still pending.

Plea in abatement to the second count, that prior to the commencement of the suit, the plaintiff sued the defendant in assumpsit before a justice of the peace, on the same contract on which this count is founded; that the defendant obtained a judgment in that suit for ten dollars, and the plaintiff appealed, which appeal is still pending.

Held, on demurrer, that the first plea was bad, and the second good.

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PROMISSORY NOTE—PLEA OF NO CONSIDERATION.—To debt on a promissory note, the defendant may plead in general terms that the note was made without any good or valuable consideration whatever (a).

SAME—PATENT RIGHT.—A plea in such case, that the note was made in consideration of the sale and conveyance to the defendant of the right to use, sell, &c., a certain patent right, which patent right was of no value, is insufficient (b).

SAME.—So, if the plea be that the note was executed in consideration of the sale and conveyance to the defendant of a right to use, sell, &c., a certain patent right, which the payee represented to be useful and valuable, but which was in fact of no use or value, it is not sufficient (c).

SAME.—But a plea in such case, that the note was made in consideration of the sale and conveyance to the defendant of a right to use, sell, &c., a certain patent right, which the payee represented he owned and had authority to sell, when in fact he had no such ownership or authority, is a good defence to the suit.

SAME—REPLICATION.—A replication to the last-mentioned plea, that the note was executed for a good and valuable consideration, without fraud, &c., is not sufficient on special demurrer.

ERROR to the *Randolph* Circuit Court.

STEVENS, J.—Debt by *Kernodle* as assignee of *Norris* against *Hunt* upon two promissory notes. The material allegations of the declaration are: That *Hunt* made his certain promissory note, &c., to said *Norris*, by which he promised to pay, &c., \$100, for value received, &c., and that he made his certain other promissory note, &c., to said *Norris*, by which he promised to pay, &c., sixty-five dollars, &c., upon condition that *Moses Mendenhall's* patent perpendicular grist mill plan should be a good and useful plan; if not, said last-mentioned note should be void, &c.; with an averment that the said patent perpendicular grist mill was a good and useful plan, &c. To this declaration the defendant pleaded five several pleas.

First, that the said notes were voluntary, being made without any good or valuable consideration whatever.

(a) *Clark v. Harrison*, 5 Blackf., 305

(b) *Wheelock v. Barney*, 27 Ind., 464.

(c) *Fowler v. Smith*, 3 Ind., 188; Id., 39; 8 Id., 79; 6 Blackf., 279.

Secondly, that the notes were made for and in consideration of the right of making, using and vending to others, to use, &c., the patent right of *Moses Mendenhall's* patent perpendicular grist mill, which was sold and conveyed to the obligor by the said *Norris* and one *Treadway* by deed of conveyance, &c.; and that at the time of said sale and conveyance, and at the time of making said notes, the said patent right was not, nor is it now, of any value or use to him, the obligor, &c.; and therefore the notes were given without any good or valuable consideration whatever, &c.

[*58] *Thirdly, that the notes were made for and in consideration of the right of making, using, and vending to others to use, &c., the patent right of *Moses Mendenhall's* patent perpendicular grist mill, which was then and there sold and conveyed to the obligor by the said *Norris* and one *Treadway* by deed of conveyance, &c., and that at the time of said sale and conveyance, and at the time of making said notes, they, the said *Norris* and *Treadway*, represented to him that the said patent was a good, useful and valuable improvement for grinding corn and other grain; and that he, confiding and relying upon said warranty, made the said promissory notes, &c., when in fact the said patent right was not a useful and valuable improvement, &c., but was and is of no value, &c.; and therefore the consideration was wholly insufficient, &c.

Fourthly, the fourth plea is precisely like the third, with an additional averment, that the said *Norris* and *Treadway* well knew at the time they represented the said patent right to be a useful and valuable improvement, that it was not useful and valuable, and thereby falsely and fraudulently deceived him, &c.

Fifthly, That the notes were made for and in consideration of the right of making, using, and vending to others to use, &c., the patent right of *Moses Mendenhall's* patent perpendicular grist mill, which was then and there sold and conveyed to the obligor by said *Norris* and one *Treadway* by a deed of conveyance, &c.; and that at the time of the sale and conveyance they, the said *Norris* and *Treadway*, represented themselves to be

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the true and lawful owners of said patent right, and that they had full power and lawful authority to sell and convey, &c.; and that confiding in that representation, he made the notes, &c., when in truth the vendors had no right or title to said patent, nor had they any lawful power or authority to sell and convey, &c., and therefore the consideration had wholly failed, &c.

The first and second pleas were severally demurred to, and the causes of demurrer to the first plea specially assigned; which causes are, that the plea is in general terms, when it should specially show the special matter relied on; and that it concludes with a verification, when it should conclude to the country, &c. The demurrer to the second plea was sustained, and the one to the first plea overruled.

[*59] *To the third, fourth and fifth pleas, the plaintiff replied, that he ought not to be barred, &c., because, &c., the said notes, &c., were made for a good and valuable consideration, without fraud, &c., and concluded to the country, &c. To which replications the defendant demurred, and the demurrers were sustained by the Court, and final judgment rendered for the defendant.

The first question is, was the demurrer to the first plea correctly overruled?

The first plea is good, and consequently the demurrer was correctly overruled. That question is settled in the case of *Huston v. Williams*, decided by this Court at their May term, 1833. In that case, it is said that a plea averring that a bond is voluntary, and without either a good or valuable consideration, is sufficient without any averments more special; because there are no facts more special in such a case to aver. If there was no consideration, there is nothing to make averments about. Such a plea, however, will not be available on trial, if there was any consideration whatever, no matter how fraudulent or trifling that consideration may have been.

The second plea is so glaringly defective that an examination of it is useless; the demurrer to it was correctly sustained.

The next and last question is, was the demurrer to the

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replication to the third, fourth and fifth pleas correctly sustained?

It is a principle not necessary to reiterate, that a demurrer at any stage of the pleadings runs back to the first substantial error; and in this case, if the pleas are insufficient, the defendant can not complain of the defects in the replication. We will examine the third plea separately. This avers, that the consideration for which the promissory notes were given was a patent right for a certain grist mill, &c.; and that the vendors represented that the said patent mill was a good, useful, and valuable improvement for grinding corn, &c., when in truth it was of no value, &c.; and that he, the defendant, confiding in that representation, purchased, &c. These averments are entirely insufficient. They set out a consideration, and admit that that consideration was received, and was, has been, and is, without interruption, possessed and enjoyed by the vendee; that he got all he contracted for, and that [*60] the title is *good. No defects or insufficiencies either in title or any thing else connected with the consideration are complained of; there is no charge that any thing was concealed from his knowledge in any way. The complaint is, that the vendor represented it to be useful and valuable when it was not, and that he, confiding in that representation, purchased. These allegations are insufficient; no material issue can be made upon them; what one man may esteem very valuable, another may deem worth nothing. There is no averment that the vendee was ignorant of the value at the time of the purchase, and was therefore deceived. But if it were so averred, that would not of itself be sufficient. 2 Kent's Comm., 485, 486; *Harvey v. Young*, Yelv., 21; *Bayly v. Merrel*, 3 Bulst. Rep., 94; Cro. Jac., 386; *Davis v. Meeker*, 5 Johns. Rep., 354; *Jendwine v. Slade*, 2 Esp. Rep., 572; Sugdon on Vendors, 2; *Chandelor v. Lopus*, Cro. Jac., 4.

The question in these cases is, did the vendor deceive the vendee by his false and fraudulent representations respecting some material fact, about which the vendee could not by common and ordinary diligence inform himself, in relation to

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the quality, the quantity, or the performance, &c., of the thing sold? As if the vendor, in this case, had falsely and fraudulently represented to the vendee, that said patent mill would grind one hundred bushels of grain in a given time, or that it would make good meal and flour, &c., when in truth all these statements were false; and the vendee could not by ordinary diligence inform himself and had relied solely on the honesty and integrity of the vendor. In such a case there would be something on which to form a material issue. The plea, however, contains no such allegations.

Again, this plea goes to the whole consideration of both notes. The plaintiff counts upon two several promissory notes, one for \$100, the other for \$65. The note for \$100 is an absolute note, and appears upon its face to have been given for value received. The note for \$65 is conditional: It is to be void if *Moses Mendenhall's* patent perpendicular grist mill is not a good and useful plan; and the declaration as to that note avers that it is "a good and useful plan." If this plea applied only to the consideration of this conditional note, it would be sufficient although replete with surplusage.

A plea to this part of the declaration need only aver, [*61] that *"*Moses Mendenhall's* patent perpendicular grist mill is not a good and useful plan," with a proper beginning and a conclusion to the country. That averment would negative the allegation in the declaration and the condition of the note, in language as special and certain as the declaration and condition are, and would therefore put the material matter in issue. But this plea goes to the whole consideration of both notes, and is therefore insufficient.

As to the fourth plea we give no opinion. It is complicated and admits of doubt, therefore we have not sufficiently examined it. Whether it is sufficient or insufficient, is immaterial as respects the conclusion to which we have come.

The fifth plea avers, that the consideration of said notes was the same as is alleged in the other pleas; that is, a patent right, &c., to a certain patent grist mill, &c.; but it avers that the vendor, at the time of the sale and conveyance, &c., of

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said patent right, represented and warranted that he was the true and lawful owner of said patent right, and that he had full power and lawful authority to sell and convey the same, &c. It then alleges that the vendor was not the owner; that he had no right, title, or interest in it; and that he had no legal power or authority to sell, &c. This plea is well pleaded both as to form and substance, and is a good bar to the action; and the demurrer to the replication to it was well sustained, if the replication is insufficient.

The replication is, that the notes, &c., were made for a good and valuable consideration, without fraud, &c. This the plaintiff in error insists is sufficient; that a general replication in such cases is permitted; and refers to the case of *Boone v. Shackleford*, 4 Bibb, 67, to sustain him. In that case the plea was, that the bond was voluntary; and the replication simply replied the negative, that it was not voluntary; that replication was held to be sufficient. The plaintiff in error, however, admits that the plea and replication in that case are not directly in point, but relies on the reasoning of the Court. We have carefully examined that case, and find the argument of the Court to be simply this, that the party is not, under such a plea, bound to specially reply the special consideration for which the bond was made, but may, if he choose, simply deny the allegations of the plea. This we apprehend is correct.

The question in all these cases is, has the replication [*62] tendered *a direct and material issue to any of the substantive and material allegations of the plea? If this has been done, the replication is generally good.

In the above case of *Boone v. Shackleford*, the plea admitted the making of the bond, and admitted that the obligor was bound, if there were any consideration to sustain it, and averred that there was no consideration, but that it was purely voluntary. If this plea did not contain the truth, as to the consideration for which the bond was given, the right of the plaintiff to recover was confessed. The replication denied the truth of the plea, and put the proper and material fact in issue, and was therefore sufficient.

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The plea in this case is very different. It specially shows, that the consideration of the notes was the sale and conveyance to the obligor of a certain patent right, &c., averring a total failure of that consideration, by reason of the vendor's not being the owner of the patent, and not having power and authority to sell and convey, &c. This plea might have been replied to by denying that the notes were given for the consideration alleged in the plea, &c.; or by denying that the consideration had failed in manner and form, &c.; but this is not done. The replication before us neither denies nor affirms either allegation. It is left entirely uncertain, whether the plaintiff intended to deny that the notes were given for the consideration stated in the plea, or whether he intended to deny that the consideration had failed, &c. This replication, if taken in one sense, is an affirmative pregnant with a negative, and if taken in another sense, it is a negative pregnant with an affirmative. It is uncertain and clearly insufficient. The demurrer is special and must prevail.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

J. Rariden, for the plaintiff.

J. Perry and *M. M. Ray*, for the defendant.

[*63]

M'HATTON v. BATES and Another.

JUSTICE'S COURT—PLEADING.—The plaintiff in a justice's Court has the benefit of the general issue, though it be not pleaded, and though a special plea be filed.

WAGER.—If goods be won on a wager respecting the result of a Presidential election, and be delivered to the winner, the loser can not, either at common law or under our statute, sustain an action against the winner for the price of the goods.

SAME.—Such a wager is illegal, and if the goods be not delivered to the winner, he is without remedy (*a*).

(a) See *Wade v. Demins*, 9 Ind., 35; *Alexander v. Mount*, 10 Id., 161; *Woodcock v. McQueen*, 11 Id., 141; Id., 59; Id., 447; 13 Id., 178, 344; 22 Id., 471.

M'Hatton v. Bates and Another.

ERROR to the *Marion* Circuit Court.

M'KINNEY, J.—*H. and D. Bates* brought suit against *M'Hatton* before a justice of the peace on an account. The defendant filed the following defense: *H. Bates & Co. to Robert M'Hatton, Dr.* To debt of honor, Presidential election, sixteen dollars. The case was tried before the justice, and a judgment rendered on the verdict in favour of the defendant. The plaintiffs appealed to the Circuit Court, and the cause was submitted to the Court, without the intervention of a jury, and judgment given in favour of the plaintiffs.

The only material question which the case presents arises from an exception taken by the defendant to the opinion of the Circuit Court, rejecting certain testimony offered by him. It appears that after the plaintiffs had gone through with their evidence, the defendant offered to prove that two yards of the cloth mentioned in the plaintiffs account (being the only cause of action filed by them, and amounting to sixteen dollars, and being the whole amount claimed as a balance due from the defendant), had been won by the defendant from one of the plaintiffs upon a bet or wager upon the result of the Presidential election, and that the cloth was delivered to the defendant with the knowledge and assent of both the plaintiffs upon such winning, and without the expectation or intention of its being otherwise charged or paid for. This testimony was rejected, and we must decide whether the rejection was correct. If the testimony was appropriate to the defense, and that defense a good one, the testimony should have been admitted. The testimony, it is apprehended, was rejected on the ground that it was not appropriate and relevant to the defense relied on: at least, this position has been assumed by the defendants in error in support of the judgment of the Circuit Court, and demands, before we advance further, some examination.

[*64] *The defense filed by the plaintiff in error was certainly very general, and leaves much at large the matter he relied on as a bar to the action. This imperfect defense should not, however, have deprived him of the advantage of the general issue if, under it, he could adduce evidence

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to show that the plaintiffs were not entitled to judgment. The defendant, then, having the benefit of the general issue, though not pleaded, we come to the inquiry, does the evidence offered conduce to show that the plaintiffs should not recover?

From the testimony rejected, it appears that the plaintiff in error offered to prove that the cloth, to recover the price of which the suit was brought, had been delivered to him with the knowledge and assent of both the defendants in error, on its being won from one of them on a wager on the result of the Presidential election.

It has long been regretted that, at common law, it was settled that actions on wagers, when they were not against good morals and sound policy, could be maintained; but such being the law, courts, without a change by statutory enactment, are bound to apply it. That question, if it were open, is not now before us, and we shall therefore confine ourselves to the case on the record.

In the case of *Bunn v. Riker*, 4 Johns. R., 426, which was on a wager of the character of the present, the action was brought to recover the money won. The Court decided that the wager was against the principles of sound policy, and void. Had the property, therefore, bet on this wager not been delivered, the plaintiff in error could not have recovered it by action, as the wager was illegal and void; but it seems the relative situation of the parties is entirely changed when, on such an illegal wager, the party losing money or property has paid or delivered it to the winner. A few cases only in support of this long-settled principle will be noticed.

In *Howson v. Hancock*, 8 T. R., 575, which was assumpsit to recover back money paid over to the winner upon an illegal wager, by the consent of the loser, *Ld. Kenyon* said: "There is no case to be found where, when money has been actually paid by one of two parties to the other, upon an illegal contract, both being *participes criminis*, an action has been maintained to recover it back again." And in the same case,

Lawrence, justice, concurring, adverted to the maxim [*65] that when both *parties are equally criminal against

the general laws of public policy, the rule is *potior est conditio defendentis*. *M'Cullum v. Gourlay*, 8 Johns. Rep., 147, is similar to the present case, and it is there said, "The Court will not help the plaintiff to obtain relief from a bet, when the money or property has been fairly paid or delivered."

Having thus seen, that, at common law, the evidence offered by the plaintiff in error would have constituted a bar to the recovery sought, it is necessary to recur to our legislation, and see whether a change has been made. The only statute which affects the question is, "An act to prevent unlawful gaming." R. C., 1831, p. 282. The first section declares, "That all promises, agreements, notes, bills, bonds, contracts, mortgages, or other securities whatsoever, made, &c., when the whole or any part of the consideration of such promise, agreement, conveyance, or security, shall be for money or other valuable thing whatsoever, won, laid, or betted, at cards, dice-tables, tennis-balls, or other game or games whatsoever, or at any horse-race, or cock-fighting, or any other sports or pastime, or any wager whatever, &c., shall be utterly void and of no effect." The second section provides, "That if any person or persons at any time, by playing at any game or games, or betting on the hands or sides of such as do play at any game or games, shall lose to any one or more persons so playing or betting, any sum of money or any valuable thing, and shall pay or deliver the same or any part thereof; the person so losing and paying or delivering the same shall be at liberty, within six months next following, to sue for and recover the money or other valuable thing so lost and paid or delivered with costs of suit, by action of debt founded on this act," &c.

Agreeably to the second section, it seems that if any person by playing at any game or games, or betting on the hands or sides of such as do play at any game or games, shall lose, &c., such person by proceeding under the statute, and founding an action of debt thereon, may recover the money or other valuable thing, &c. An important question arises, do the provisions of this section apply to the recovery of money or property lost on wagers, when the same has been paid or

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delivered? It is believed not. It is true, by the first section all promises, notes, &c., when the consideration thereof [*66] shall be for money *or other valuable thing won, lost, or betted at cards, &c., shall be void; and this we have said is the common law in relation to illegal wagers; consequently, the first section makes no change as to them. Does the second section make a change? This must also be answered in the negative; since that section only enables the recovery of money or property paid or delivered, when it has been lost by playing at any game or games, or by betting on the hands or sides of such as do play at any game or games. It is unnecessary to decide what game or games, if any, other than those mentioned in the first section, are included in the second, since, so far as this decision goes, it is clear that money or property lost on a wager, and paid or delivered, is not within the provisions of the section. No reasoning is required to prove that a wager is not a game, for the proposition is self-evident. If this be a sound construction of the statute, the common law is not changed on this point. In this construction we are sustained by that given on a similar statute by the appellate court of a sister State. *Reed v. Harrod's Heirs*, Print. Dec., *Ky.*, 192.

It will be preceived from the statute, that there is a marked distinction between protection from the recovery of property so lost, and the recovery of the property when voluntarily delivered. The first section, in all the cases designated, affords that protection; and the second section enables the recovery in the cases specified, when payment has been made; but the other cases are left to the operation of the common law principles (1). The action has been brought without reference to the provisions of the statute, and if the evidence shows a case in which neither at common law, nor by the statute, a recovery could be had (and we think the evidence is of that character), it should have been received.

Several other questions are presented by the record, but their examination, from the view taken of that deemed most material, is rendered unnecessary.

Conwell and Another v. Evill.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. H. Scott, for the plaintiff.

C. Fletcher, for the defendant.

(1) The act of 1838 expressly makes promises for money, &c., won, &c., on the result of any election, void: in other respects the first three sections of that act are the same with the act cited in the text. Rev. Stat., 1838, p. 324.

[*67] CONWELL and Another v. EVILL.

PAROL EVIDENCE ADMISSIBLE TO SHOW A DEED, ABSOLUTE ON ITS FACE, WAS INTENDED AS A MORTGAGE.—A bill was filed to redeem certain premises which the complainant had caused to be absolutely conveyed to the defendant. The bill averred that the deed was intended to be only a mortgage; but this averment was expressly denied by the answer. *Held*, that though the complainant might introduce parol testimony to show that a mortgage was intended, yet that the testimony must be very clear and decisive to enable him to succeed. *Held*, also, that evidence of the grantee's confessions, in such case, should be received with great caution. (a)

SAME—WHAT PRESUMPTIVE EVIDENCE OF.—Proof that the property had cost the complainant about three times as much as he received for it from the defendant, and that the complainant had continued in possession for two years after the execution of the deed, was held not to be sufficient to warrant a presumption that the sale was not absolute, against the face of the deed and the defendant's answer.

ERROR to the *Dearborn* Circuit Court.

BLACKFORD, J.—*Evill* filed a bill in chancery against *Conwell* and *Lewis*, for the redemption of a lot of ground in the town of *Aurora*, which lot as alleged in the bill, had been mortgaged by the complainant to *Conwell*. The deed, referred to in the bill, is a conveyance absolute on its face, by *Lewis* to *Conwell*. The answer of *Conwell* expressly denies that the deed was intended to be a mortgage; and asserts that it is, and was intended to be, an absolute conveyance. *Lewis's* answer

(a) *Crane v. Buchanan*, 29 Ind., 570; 5 Blackf., 361; 1 Ind., 84; 19 Id., 334; 22 Id., 59; 6 Id., 277.

Conwell and Another v. Evill.

is to the same effect. The decree of the Circuit Court is in favour of the complainant.

Lewis, as appears by the evidence, had an absolute deed for the lot, executed by the trustee of the *Aurora* association; but *Evill* was entitled to a resulting trust in it, in consequence of his having paid the purchase-money. By virtue of an agreement between *Evill* and *Conwell*, and at the request of *Evill*, *Lewis* conveyed the lot in fee to *Conwell*. The consideration of the conveyance was the sum of sixty dollars, previously due from *Evill* to *Conwell*, the sum of fifty dollars paid for *Evill* to *Lewis* by *Conwell*, and some other debts of *Evill* to be paid by *Conwell*. The property cost *Evill* about three times the amount, which is said to have been paid for it to *Evill* by *Conwell*. *Evill* continued to occupy the premises for about two years after the conveyance, when *Conwell* took possession without *Evill*'s consent.

Parol testimony was introduced by the complainant, with a view of proving that the deed was intended merely as
[*68] a *mortgage, to secure the payment to *Conwell* of the money due to him by *Evill*.

Parol evidence to show that a deed, absolute on its face, was intended to have the effect of a mortgage, has been refused admission in a court of law. *Flint v. Sheldon*, 13 Mass., 443. Such evidence has been decided to be inadmissible even in a court of equity, unless the circumstance of the deed appearing to be absolute, when it was intended to be a mortgage, was occasioned by mistake or fraud. *Wesley v. Thomas*, 6 Harr. & Johns., 24; *Watkins v. Stockett's Administrator*, Ibid., 435. In *New York*, the chancellor has admitted the evidence, on the ground that the attempt to set up the deed as absolute is a fraud. *Strong v. Stewart*, 4 Johns. Ch. Rep., 167; *James v. Johnson*, 6 Johns. Ch. Rep., 417. The admissibility of such parol evidence, in equity, has been admitted by this Court, but with an evident disposition to limit the privilege within narrow bounds. *Aborn v. Burnett*, Nov. term, 1827.

In the case before us, there is not only an absolute deed for the premises to *Conwell*,; but there is the positive answer of

Conwell, that his purchase was unconditional, and that there was no agreement or understanding whatever, that the deed should be only a mortgage. The parol evidence that can overturn the testimony arising from the face of the deed and the grantee's answer, must be very clear and decisive. The evidence relied on by the complainant for this purpose, consists of loose observations made by *Conwell* in conversing with some of the witnesses. Testimony of such conversations has always been received with great caution. In *Aborn v. Burnett*, already cited, the Court says: "The decree is founded on parol evidence of the declaration of the complainant, in certain conversations with the witnesses or in their hearing; a species of evidence extremely liable to be misunderstood or perverted, very difficult to be assailed, and at the same time so evanescent that great caution ought to be used in admitting it to control an absolute deed." In the case of a bill to redeem, where the complainant relied on proof of the grantee's confessions, in order to convert an absolute deed into a mortgage, the Court decided against its sufficiency. The chancellor in that case says: "The whole rests on the naked, unassisted confessions of *Pell*, made to or in the presence of certain witnesses, about seventeen years after he had been in the peaceable [*69] occupation of the *premises as apparent owner. It was once observed in the Supreme Court, 6 Johns. Rep., 21, that acknowledgments of the party, as to title to real property, are generally a dangerous species of evidence; and though good to support a tenancy, or to satisfy doubts in cases of possession, they ought not to be received as evidence of title, as it would counteract the beneficial purposes of the statute of frauds. That doctrine strikes me as just and sound, and principles are essentially the same in both courts." *Marks v. Pell*, 1 Johns. Ch. Rep., 599.

If all that *Conwell* said, in any one of the conversations relied on, be examined, it will be found that his remarks are not in contradiction of his answer. He said, at several times, that he did not wish to keep the lot, provided he could obtain his money from *Evill*; and he once said, that he had not taken

Magee v. Siggerson, on Appeal.

a mortgage, because he did not wish the trouble of a foreclosure. But upon all these occasions, when the subject was mentioned, *Conwell* always contended that the deed was absolute, and that there never was any intention or understanding that it should be a mortgage. Taking, therefore, as we are bound to do, the whole together of what *Conwell* said in any one conversation, there appears to be nothing confessed by him, upon which the bill can be sustained.

The complainant also relies upon the inadequacy of the price said to be paid for the lot, and upon the continuance of *Evill* in possession for two years after the date of the conveyance, in order to show that the sale was not intended to be absolute. These circumstances, we think, are entitled to more weight than any of the remarks, proved to have been made on the subject by *Conwell*. The inadequacy of the price, however, is not sufficiently great, nor was the possession sufficiently long, under the circumstances, to warrant a presumption against the face of the deed and the answer of the grantee.

Per Curiam.—The decree is reversed. Cause remanded, with directions to the Circuit Court to dismiss the bill, &c.

J. Sullivan and *J. Test*, for the plaintiffs.

G. H. Dunn, for the defendant.

[*70] *MAGEE v. SIGGERSON, on Appeal.

IN an action of replevin, the writ must contain a description of the goods for which the action is brought; but it need not show that the affidavit, required by the statute, had been made by the plaintiff.

Parker v. Smith, in Error.

RODMAN v. WILLIAMS, in Chancery.

RODMAN purchased of *Williams* a certain tract of land for the sum of \$250. He paid \$100 in hand, and gave his notes for the residue of the purchase-money; and *Williams* gave him a bond conditioned for a conveyance when the notes should be paid. There was a mortgage on the land at the time in favour of *Yandes*, of which *Rodman* had no knowledge; and *Williams* fraudulently represented to *Rodman* that the land was unincumbered. The payments afterwards made by *Rodman* to *Williams*, with the mortgage-debt which he also paid, amounted to the sum due on the notes.

On a bill in chancery filed by *Rodman*, the Court decreed that he was entitled to a conveyance, and appointed a commissioner to execute the deed. It was further decreed that the notes should be delivered up to the complainant. See *Holman v. Creagmiles*, 14 Ind., 177.

PARKER v. SMITH, in Error.

ACTION of disseisin for certain land which the plaintiff had purchased for taxes in 1827. *Held*, that the statute required the assessment-roll, and the advertisement of sale for taxes, to be filed in the office of the clerk of the Circuit Court; and that therefore the assessment of the tax, and the advertisement of sale, should be proved by copies certified, not by the clerk of the board of justices, but by the clerk of the Circuit Court.

Held, also, that under the statute of 1824, the defend-
[*71] ant in *such case may prove, notwithstanding the collector's deed, that from the time the precept came into the collector's hands up to the time of sale, there was sufficient personal property on the premises, out of which the taxes

Ewing and Another v. Harris and Others, in Chancery.

could have been made, and that there was also a tenant on the premises.

Held, also, that the collector's deed, under the above-named statute, furnishes no evidence that the tax had been legally assessed, or that it had not been duly paid, or that the land was not exempt from taxes.

Held, also, that under that statute, such a deed is *prima facie* evidence, and nothing more, of the regularity of the proceedings relative to the purchaser's title, so far as the acts of the collector are concerned (1).

(1) In a case of a sale for taxes in 1826, it was held that though the collector's deed was *prima facie* evidence, under the statute, that the collector, after the receipt of the precept requiring him to sell, had done his duty relative to the sale, yet that the deed was no evidence that the collector had authority to sell, and that the existence of the precept authorizing him to act in the premises must be proved *aliunde*. *Doe, d. Morris v. Himelick*, May term, 1838.

The language of the statute of 1824, so far as relates to the effect of the collector's deed as evidence of the regularity of the sale, is changed by the statute of 1831. The words of the latter statute are, that "such conveyance shall be *prima facie* evidence that the sale was regular according to the provisions of this act. Rev. Code, 1831, p. 436.

That part of the revenue law which authorizes the collectors to sell lands for the non-payment of taxes is repealed. Stat., 1832, p. 265. The collector now, on or before the first of *December* annually, returns a list of the lands on which the taxes have not been paid to the school commissioner of the proper county, and a period of three years from such return is given to the owner of any of the land on the delinquent list to redeem the same by payment of the tax, &c. If payment be not made within the prescribed time, the school commissioner proceeds, according to the provisions of the statute, to cause the title of the land to be vested in the State for the use of the common schools of the county in which it is situated. Stat., 1832, p. 264, 265; Stat., 1835, p. 37. Vide *Dentler v. The State*, Nov. term, 1836; *Richardson's Heirs v. The State*, Nov. term, 1838. See cases cited in *Gavin v. Shuman*, 23 Ind., 34.

EWING and Another v. HARRIS and Others, in Chancery.

BILL in chancery to set aside a conveyance of real estate, executed to *Harris* by the other defendants. The bill stated

Turpin v. The State, in Error.

that the grantors, at the time the deed was executed, were indebted to the complainants in a certain sum of money, [*72] of *which the grantee had notice; that the conveyance was without consideration, and was made by the grantors and received by the grantee, for the purpose of defrauding the complainants out of their demands. It was also stated that the complainants afterwards obtained judgments for the debts before a justice of the peace; took out executions thereon which were returned *nulla bona*, and filed transcripts of the judgments in the clerk's office of the Circuit Court.

The answers denied all fraud, but the allegations of the bill, in the opinion of the Court, were sustained by the depositions.

The Court set aside the conveyance as fraudulent and void as to creditors.

TURPIN v. THE STATE, in Error.

INDICTMENT against three persons for a riot. Plea, not guilty. Verdict of guilty as to one, and of not guilty as to the others. *Held*, that upon this verdict a judgment could not be rendered against the defendant found guilty. *Aliter*, if the indictment had been against the defendants together with others whose names were unknown. 1 Russ. on Crimes, 267; *Reg. v. Soley et al.*, 2 Salk., 594; *Rex v. Scott et al.*, 3 Burr., 1262; 2 Chitt., C. L., 488 (1).

(1) A riot is where *three* or more actually do an unlawful act of violence. 3 Inst., 176. An indictment, however, against *A*, for that he, *together with divers other persons to the jurors unknown*, committed the offense, is good. *Anon.*, 3 Salk., 317.

END OF MAY TERM, 1835.

[*73]

*CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1835, IN THE TWENTIETH YEAR OF THE STATE.

VATTIER *v.* THE STATE.

RECOGNIZANCE—PLEA TO ARRAY OF GRAND JURY.—A person was recognized by a justice to appear at the next term of the Circuit Court, to answer to a charge of assault and battery with intent to murder, and was at that term indicted for the offense. *Held*, that the defendant when first *arraigned*, though it were at a subsequent term to that at which the indictment was found, might plead in abatement that the grand jurors who found the indictment had not been selected conformably to the statute (a).

ERROR to the *Dearborn* Circuit Court.

M'KINNEY, J.—*Vattier* was indicted and tried in the *Dearborn* Circuit Court on a charge of an assault and battery with intent to murder. He was found guilty, and judgment was rendered against him. He has brought the case here, and alleges that the judgment should be reversed, on the ground of error having been committed in overruling a demurrer

(a) *The State v. Herndon*, 5 Blackf., 75; *Shattuck v. The State*, 11 Ind., 473; *Hardin v. The State*, 22 Ind., 347.

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which he filed to the replication to his plea in abatement. The record shows, that on being arraigned and required to plead to the indictment, he pleaded in abatement to the array of the grand jury, averring that the persons by whom the [*74] indictment was *found were not legal grand jurors, not having been selected as required by law. The State replied, that the indictment should not be quashed, because the defendant was recognized to appear personally on the first day of the term of the *Dearborn* Circuit Court at which the indictment was found, then and there to answer the State on complaint of an assault, &c., with intent to murder, &c., it being the same complaint on which the indictment was founded; at which time the said *Vattier* should have pleaded to the array of the grand jury and not afterwards.

Should the demurrer have been overruled? is the only question for our consideration.

It is contended by the State, that though at the term at which the indictment was found, the plaintiff in error, being recognized to answer the charge embraced in the indictment, could have pleaded in abatement to the array of the grand jury, yet having omitted to avail himself of this right at that term, he is thereby concluded and his plea consequently bad. This position, it is believed, cannot be maintained.

By the common law, with a view to the protection of innocence from unfounded prosecutions, instituted either by power or malevolence, the organization of a grand jury was an object of primary importance; and we discover from *English* legislation, that the authority of parliament was frequently interposed, in re-asserting the original purity of the institution, prescribing the duties of the sheriff, and the qualifications of individual jurors. *Hawkins*, in 2 Pleas of the Crown, 215, says, "That at common law, every indictment must be found by twelve men at the least, every one of which ought to be of the same county, and returned by the sheriff or other proper officer, without the nomination of any other person whatsoever, and ought to be," &c. He also says, "That any one under a prosecution for any crime whatsoever, may by the

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common law, before he is indicted, challenge any of the persons returned on the grand jury, as being outlawed, &c., or returned at the instance of a prosecutor, or not returned by the proper officer." &c.

Thus stood the common law, but neglect and disregard of its requirements gave occasion for the stat., 11 H. 4, c. 9, which prescribes by whom indictments shall be found, and declares that if an indictment be found in any point [*75] otherwise, it shall *be void. From the preamble to this statute, we learn that inquests were taken of persons named to the justices without due return by the sheriff, by whom many offenders were indicted, as well as others, not guilty, by conspiracy, abetment, &c., against the course of the common law. It declares all such indictments void, and requires that they should, for the future, be found as formerly, "without any denomination to the sheriff, &c., by any person, of the names which by him should be impanneled." Among several points resolved in the construction of this statute, *Hawkins*, in 2 Pl. Cr., p. 218, 219, gives the following: "That a person arraigned upon any indictment taken contrary to the purview of the statute, may plead such matter in avoidance of the indictment, and also plead over to the felony. That a person outlawed upon any such indictment without a trial, may also show, in avoidance of the outlawry, that the indictment was taken contrary to the purview of the statute. But that if a person who is tried upon such an indictment takes no such exception before his trial, it may be doubtful whether he may be allowed to take such exception afterwards, because he hath slipped the most proper time for it." He cites many authorities, all of which sustain his text. Among these is the case of *Withipole*, Cro. Car., 134, the first occurring under the statute. He pleaded that the foreman of the grand jury, by whom the indictment was found, had nominated himself to be of the jury, and fourteen others, &c. The plea was submitted to all the judges, and decided to be good.

Whether the plea before us would have been good at common law, is not thought material for inquiry, as its

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character must be settled by the statute. The statute prescribes the manner in which grand jurors shall be selected, and it must be conceded to be a mode which, if pursued, is as effectual as any that has been devised to protect the citizen from unfounded prosecution, and to deprive the sheriff, if inclined, of the power and opportunity of acting corruptly. The board doing county business, and the clerk of the Circuit Court, make the selection by lottery, and the sheriff summons those whose names are thus furnished. If this mode was not adopted, as alleged by the plea of *Vattier*, in selecting the jury by whom the indictment against him was found, and he availed

himself of the exception on his arraignment, we can [*76] not perceive a *sufficient reason for the rejection of the defense. If, by the common law, being under a prosecution, he could challenge any of the grand jury to whom the charge against him was about to be submitted, we think that, *on arraignment*, he should not be deprived of an exception which would show that the indictors were not "*probi et legales homines*" (1). Under the statute of *Henry*, we have noticed that *Hawkins* says that if the exception be not made before trial, it is doubtful whether it can be allowed afterwards, because he hath slipped the most proper time for it. It is not necessary for us to examine this doubt, and the reasons upon which it may be founded, as the case before us is different from one in which that doubt could arise. The case of *Withipole* was before *Hawkins*, and of the validity of the defense before trial, he could have no doubt.

The question then arises, should our statute receive the construction that was given to that of *Henry* 4, c. 9? This question is answered by recurring to the reasons which induced the adoption of the *English* statute. They are given in its preamble, and show that the common law was disregarded in taking inquests by persons named to the justices, without due return by the sheriff, of whom some were outlawed, and some fled to sanctuary, and by whom innocent persons, through conspiracy, &c., were indicted. This act was declaratory of the common law. In adverting to our statute, we have

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suggested the benefits that must result from a strict compliance with its provisions, and although with us the reasons set out in the preamble to the *English* statute may not have existed, yet it is evident that the end proposed by each was the same—the purity of the institution, and the protection of the citizen from unfounded prosecutions; consequently, each statute should receive the same construction. Adopting, therefore, the construction of the *English* statute, as settled in the case of *Withipole*, we are brought to the conclusion that *Vattier's* demurrer to the replication to his plea should have been sustained. This construction has, in part, at least so far as the point involved required it, been given by this Court. *Jones v. The State*, 3 Blackf., 37.

Per Curiam.—The judgment is reversed, and the verdict set aside. Cause remanded, &c.

D. J. Caswell, for the plaintiff.

W. Herod, for the State.

[*77] *(1) The *arraignment* of a prisoner consists of three parts: 1st, Calling him to the bar, and by holding up his hand, or otherwise making it appear he is the party indicted. 2d, Reading the indictment to him distinctly in *English*, that he may fully understand the charge. 3d, Demanding of him whether he be guilty or not guilty, and entering his plea; and then demanding of him how he will be tried; the common answer to which is, by God and the country. 2 Hale's Hist., 219; 1 Toml. L. D., 95.

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CHANCERY—PRACTICE.—The proper mode, under our statute, of objecting to the validity of a plea to a bill in chancery, is by a motion to have the plea set down for argument; but the mere circumstance that the plea was set down for argument on a demurrer to it, instead of on such a motion, can not be assigned for error.

TRUSTS—STATUTES OF LIMITATIONS.—Technical and continuing trusts, not cognizable at law, are not barred by the statute of limitations.

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SAME—FRAUD.—In cases of fraud, the statute of limitations does not begin to run until the fraud is discovered (a).

SAME.—When a request is essential to the maintenance of a suit for the non-performance of a promise or duty, the statute of limitations does not begin to run until the request has been made.

SAME—GUARDIAN AND WARD.—The administrator of a guardian was sued in chancery by the administrator of the ward, for money received by the guardian from the administrator of the ward's father, as part of the ward's distributive share of his father's estate; and it appeared that the guardian had given receipts for the money thus received. *Held*, that the demand was not barred by the statute of limitations.

WITNESS.—It was *held* in this case, that the administrator of the ward's father was not a competent witness to prove that the guardian had received from the witness the money sued for.

FORM OF DECREE.—It was also *held* that the decree for the complainant should be against the goods of the intestate, and not *de bonis propriis*.

APPEAL from the *Franklin* Probate Court.

STEVENS, J.—This is a bill in chancery filed in the Probate Court of the county of *Franklin*, by *Jesse Simonson*, as administrator of the estate of one *Joseph Russell*, jun., deceased, against *Lewis Raymond*, as administrator, and *Mary Rockafellar*, as administratrix of one *John H. Rockafellar*, deceased. The allegations of the bill are, that one *Joseph Russell*, sen., about eighteen or twenty years since died, leaving a very considerable estate, and that administration of it was granted to one *John Kiger*, &c.; that the deceased left several children his legal heirs, among whom was one *Joseph Russell*, jun., [*78] at that time *an infant; that one *John H. Rockafellar* was the guardian of the person and the estate of the said infant, and as such guardian received several sums of money from the said *Kiger*, the administrator of the estate of the said *Joseph Russell*, sen., deceased, as part of the distributive share of the said *Joseph Russell*, jun., of his said father's estate; that said guardian gave receipts for all the money he so

(a) The statute providing that actions for relief against frauds must be commenced within six years after the cause of action has accrued (2 G. & H., 156, sec. 210), greatly changes the law as it existed when *Raymond v. Simonson* was decided. It applies as well to suits in equity as at law; and under it time begins to run before discovery of the cause of action, unless the defendant shall conceal his liability. *Pilcher et al. v. Flinn*, 30 Ind., 202.

See cases cited in *Matlock v. Todd*, 25 Ind., 128.

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received, and those receipts are all exhibited and made a part of the bill, except one for about the sum of ten dollars, which is said to be lost or mislaid; that in the year 1827 said guardian died leaving a large and solvent estate, the administration of which was granted to the said *Mary Rockafellar* and *Lewis Raymond*; that in 1828 the said infant, *Joseph Russell*, jun., died, and administration of his estate was granted to the complainant, the said *Jesse Simonson*; that the said *John H. Rockafellar*, the said guardian, died with the funds of his ward in his hands, and all interest thereon; that he never paid any thing to the said ward, nor ever paid or expended any thing for his use, &c.; and that the said *Mary Rockafellar*, the administratrix, and *Lewis Raymond*, the administrator, refuse to pay the same, &c. The bill prays relief, &c.

The defendants in the Probate Court filed a plea of the statute of limitations, which the complainant demurred to, and the demurrer was sustained. Defendants then answered, saying that they admitted the death of *Joseph Russell*, sen., eighteen or twenty years ago, and the appointment of said *Kiger* as administrator, &c.; that they admitted the guardianship of their intestate, *John H. Rockafellar*, the death of the guardian, and that administration of his estate was granted to them. They also admitted that their intestate's estate is solvent and able to pay, &c. But as to the amount of the estate of the said *Joseph Russell*, sen., or as to the fact of said guardian having received the estate of his ward, or any part of it, they deny having any knowledge. Nor do they know that the guardian ever paid or advanced any thing to or for his ward, &c. They admit that they have heard that the guardian once received from said *Kiger* a horse for his ward, but that report says that the horse proved to be unsound, and that it cost as much as he was worth to cure him. They neither deny nor admit the genuineness of the receipts exhibited of said guardian; that is, the answer is wholly silent as to that.

[*79] *To this answer a general replication is filed, and one deposition is taken; that is the deposition of *John*

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Kiger, the administrator of the estate of the said *Joseph Russell*, sen., deceased, who paid the money over to the said guardian as is charged. The defendants moved to suppress the deposition on the ground of interest in *Kiger*, but the motion was overruled and the deposition was received as evidence. *Kiger* swears, directly and unequivocally, to the payment to the guardian of the several sums of money, and to the receipts, and that the small receipt of ten or twelve dollars is lost or mislaid.

The case was heard on the bill, answer, replication, exhibits, and depositions; and the Court decreed the payment of the money and interest to the complainant, together with costs of suit by the defendants *de bonis propriis*; upon which the defendants appealed to this Court, and have assigned several errors for a reversal of the decree. These errors are as follows:

1. That it was error to permit a demurrer to be filed to a plea in chancery; that no such practice is known to the books.
2. That the plea of the statute of limitations is a good and sufficient bar to the complainant's recovery, and should have been sustained.
3. That the deposition of *Kiger* should have been rejected.
4. That the judgment should have been *de bonis testatoris*, and not *de bonis propriis*.

A demurrer to a plea in chancery is a proceeding unknown to the books. That part of the practice, however, if not regulated by statute, is generally regulated by rules of court, and different courts have different rules; but we have never seen or heard of a rule, that authorized the filing of a demurrer to either an answer or a plea in chancery. If an answer is defective, exceptions are filed to it; and these exceptions are, upon petition or upon motion, set down for argument, &c. Exceptions are never filed to a plea, but if the party conceive the plea to be defective, either in form or substance, he may have the plea itself set down for argument. Blake's Ch. Prac., 114; Mitf. Plead., 367; 1 Moul. Prac., 270; 1 Newl. Prac., 117, 118. This is done either on petition or motion; if done by petition, the petition must contain the title of the cause, the

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time when the plea was filed, &c., and pray that it be set down for hearing, &c.; upon which the Court makes an order, and a copy of the petition and order is served on the

[*80] opposite *party, &c. Beames' Ord. in Ch., 121; 1 Newl. Prac., 119; 1 Moul. Prac., 270.

But under our practice acts, a mode of proceeding very different from the *English* practice prevails. Our practice is less complicated, less technical, not so expensive, more direct, and less laborious, than the system of *England*, or than the systems of several of the States of this Union. The whole dilatory, troublesome, and expensive routine of notices and services of copies of pleadings, &c., laid down in the *English* and *New York* books of practice, has been swept out of existence by a single stroke of the legislative pen. By our practice, motions and rules of court in term time, without previous notice, are substituted for petitions and notices; and if the parties be in court, they are bound to take notice of such motions and orders of court, without any special notice being given them. We have demurrers, exceptions to answers, and pleas set down for argument on motion; and the opposite party is bound to take notice of it, without the service of a special notice, if from the state of the case he is presumed to be in court. These motions must, however, be as certain and special as petitions should be. This innovation of ours upon the practice, appears to have the sanction of some great names. The modern writers say that a motion is a verbal petition, and is in its nature a petition; but that it is generally heard and acted upon without unnecessary delay or formality; and that great delay and expense are saved to the suitors by substituting motions for petitions. Lord *Eldon* says that the practice in *England* is very much altered in that particular; that most of the business of course, which had to be done on petition, is now done upon motion; and although it is not done any better than it was formerly done on petition, and perhaps not always so well, yet that the saving to suitors in expenses and delay is very great.

In the case now before us, the Court acted without any

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authority to sustain them; but the error committed was in mere matter of form, and in no sense of the word can it be said that the interest of either party was either delayed or affected by it, if the decision as to the sufficiency of the plea is correct. The demurrer, although without the sanction of any rule of practice, may be considered as a substitute for a motion to have the plea set down for argument; and as it [*81] was set down *and argued accordingly, and upon that argument a decision had, we cannot see that any harm is done.

The objection respecting the statute of limitations is not clear of doubt. The numberless inconveniences which would arise from persons being at liberty to set up demands at any distance of time, have induced legislative bodies, very wisely, to prescribe the time within which certain rights must be pursued; and in such cases length of time operates as an absolute bar. Such statutes have been pronounced by the most enlightened tribunals wise and salutary, and have been liberally construed, and extended to courts of equity, although the enactments upon their face are not, in terms, applicable to those courts. Both courts however, in *England* as well as *America*, permit such statutes to be pleaded in bar to various species of claims and actions. But still there are many cases to which these provisions do not extend, and to which, in justice and good conscience, they cannot be extended; and in such cases the lapse of time cannot be pleaded as an absolute bar; although, in numerous instances, it operates as a presumption or evidence of the right claimed having been extinguished or lost, or the demand satisfied. The general rule, however, that the statute of limitations is a bar to suits in equity, as well as actions at law, has its limits. It is opposed by another general rule, that in cases of frauds and trusts, the statute of limitations does not run.

The trusts coming within this rule are direct trusts; technical and continuing trusts, which are not cognizable at law, but which are mere creatures of a court of equity, and fall within the proper and exclusive jurisdiction of chancery.

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There are numerous eventual and possible trusts, that are raised by implication of law and otherwise, that fall within the control of the statute. Every deposit is a trust; every person who holds money to be paid to another, or to be applied to any particular and specific purpose, is a trustee, and may be sued either at law or in equity. Contracts of bailment are express and direct trusts, but these are all within the statute. The sound rule then is, that the trusts not reached or affected in equity by the statute of limitations, are technical and continuing trusts, of which courts of law have no cognizance. *Decouche v. Savetier*, 3 Johns. C. R., 190; 1 Fonb. Eq., 246, note; *Kane v. Bloodgood*, 7 Johns. C. R., 90. So [*82] long as such *a trust as that is continuing as a trust, acknowledged or acted upon by the parties, the statute cannot apply; but so soon as the trustee denies the right of his *cestui que trust*, and his possession becomes adverse, lapse of time from that period may constitute a bar in equity. *Kane v. Bloodgood*, 7 Johns. C. R., 90; *Decouche v. Savetier*, 3 Johns. C. R., 190; *Lloyd v. Gordon*, 2 Harr. & M'Hen., 254. So in the case of tenants in common. The statute of limitations does not run in favour of one tenant in common against another, unless there be an actual ouster and adverse possession. *Doe v. Prosser*, Cowp., 217; *Vandyck v. Van Beuren*, 1 Caines, 90; *Coleman v. Hutchenson*, 3 Bibb, 209; *M'Clung v. Ross*, 5 Wheat., 116.

Lord Redesdale, in the case of *Hovenden v. Lord Annesley*, 2 Sch. & Lef., 630, says, if the trustee is in possession and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust*; and if the only circumstance be that the trustee, from mere negligence or unwillingness, does not perform his trust, his possession will not operate as a bar; because his possession agrees with his title, and also with the rights of the *cestui que trust*. And Chancellor Kent, in the case of *Kane v. Bloodgood*, says, that if the *cestui que trust* demands the trust fund of the trustee, and the trustee denies his title and upon that ground refuses to perform, the possession of the trustee from that time becomes adverse, and the

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statute begins to run. It is also stated by Sir *William Grant* in several cases, that time does not bar a direct trust as between trustee and *cestui que trust*, upon the precise same principle that applies at common law to tenants in common, where the statute does not run but from the time of actual ouster, because the possession of the one is not adverse to the rights of the other, but is in support of the common title. It does not bar, so long as the trust is continuing and acknowledged. In the case of *Harmood v. Oglander*, 6 Ves., 129, 8 Id., 106, it was considered by Lord *Alvanley*, and afterwards repeated by Lord *Eldon*, that if a trust subsisted so that the trustee could recover as having the legal estate, it would follow that the right of the *cestui que trust*, as against the trustee, could not be barred. But supposing the trustee were to deny the right of his *cestui que trust* and assume absolute ownership, is there any case in equity that would allow the latter his remedy,

beyond the period limited for the recovery of legal [*83] estates at law? So *long as the trust is a subsisting one, and is admitted by the acts or by the declarations of the parties, no doubt the statute does not affect it; but when such transactions take place between the trustee and *cestui que trust*, as would in the case of tenants in common amount to an ouster of one of them by the others, the statute would begin to run. Such a trust would then stand on the same footing that constructive trusts, cases of detected fraud, and all other cases in which the statute is assumed as a rule of decision, stand on.

Again, where there is a legal as well as an equitable remedy in respect of the same subject matter, the statute is a good bar in both courts. *Roosevelt v. Mark*, 6 Johns. C. R., 266; *Kane v. Bloodgood*, 7 Johns. C. R., 90. Lord *Macclesfield*, in the case of *Lockey v. Lockey*, Prec. in Ch., 518, says, that where a trustee receives the profits of an infant's estate merely as receiver, and the infant, after he arrives at a majority, permits six years to elapse before he brings suit, the statute of limitations is a good bar in equity to his claim, for he had a remedy at law as well as in equity, and his legal remedy being barred,

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his equitable interest is also barred; that such a trust as that is not a mere creature of a court of chancery, and not cognizable by courts of law. Lord *Camden*, in the case of *Smith v. Clay*, 3 Bro., 639, *n.*, says, that whenever the legislature limits the time of actions and remedies to a certain period in legal proceedings, the court of chancery adopts the same rule, and applies it to similar cases in equity; and in all cases where there is a legal remedy, and that has been barred by the statute, the equitable right to the same thing is barred in chancery. Again, in *Harmood v. Oglander*, the same principle is recognized. In the case of *Bond v. Hopkins*, 1 Sch. & Lef., 413, Lord *Redesdale* says, that the statute of limitations does not apply, in terms, to proceedings in courts of equity, but if the equitable title is not put in suit until the legal title is barred, chancery will not relieve. Afterwards, in the case of *Hovenden v. Lord Annesley*, he again says, that if the legal title be not acted upon until it is barred, equity will not relieve. In the case of *Beckford v. Wade*, 17 Ves., 87, the Master of the Rolls says, that the statute loses its operation only in respect to cases of trust, for which there is no remedy but in a court of equity. Lord *Hardwicke*, in the case of *Sturt v. Mellish*, says, that a trust which is unaffected by a statute of limitations is [*84] *where there is such a confidence between parties that no action at law will lie, but is a mere case for the consideration of equity. 2 Atk., 610. Vide, also, *Townshend v. Townshend*, 1 Cox's Ch. C., 28.

It is well settled in *England*, that the statute of limitations does not affect or apply to legacies or distributive shares of heirs, and that the remedy to enforce payment must be sought in chancery; that the jurisdiction of equity in those cases is exclusive of law. The same doctrine appears to be adopted in several of the states of this Union. *Ward v. Reeder*, 2 Harr. & M'Hen., 154; *Irby v. M'Crae*, 4 Des., 432; *Durdon v. Gaskill*, 2 Yeates, 268. The same principle was adopted and decided in the State of *New York* by Chancellor *Kent*, in the case of *Decouche v. Savetier*. But that case, subsequently, was very much doubted by the Chancellor himself. In the case of

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Kane v. Bloodgood, he says that he made the decision in the case of *Decouche v. Savetier* in conformity to the *English* rule, without sufficient reflection as to its applicability to the laws of the State. In that State, he says, there is a legal remedy provided by an action at law in such cases, which creates a concurrent jurisdiction; and according to established principles the statute in such cases can be pleaded in either court. And, afterwards, the Supreme Court overruled the decision in the case of *Decouche v. Savetier*, and declared that each court had, in cases of legacies and distributive shares, concurrent jurisdiction, and that the statute of limitations could be pleaded in either court.

We will not, however, at this time, pursue this perplexing subject any further. Enough has been said to show the governing landmarks in these cases, and to show that the wisest of judges have had much trouble in wading through the labyrinth of difficulties, discriminations, technicalities and shades that have gathered around the statute of limitations. The case before us can be satisfactorily disposed of by applying the facts of the case to a few well settled rules.

It is a rule about which there is now no controversy, that the statute never begins to run until the party's cause of action has accrued and is ripe for suit, and until he is capable in law to sue and be sued, &c. The general principle is well settled, that the statute does not affect frauds; but still that rule has its limits. In cases of frauds, the statute begins to

[*85] *run from the time that the fraud is so fully developed and disclosed as to enable the injured party to see the nature and the extent of the fraud committed. The statute in good conscience can not run until the party has a right to commence his suit, and that right can not accrue in the case of fraud, until the injured party is informed of the injury done or fraud committed. *Kane v. Bloodgood*, 7 Johns. C. R., 122; *South Sea Company v. Wymondsell*, 3 P. Will, 143; *Croft v. Townsend's Admr's*, 3 Des., 239; *Wamburzee v. Kennedy*, 4 Des., 474; 1 Fonb. Eq., 262, notes; 12 Petersd. Abr., 342. When a promise or a duty is executory, and is not to be

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performed or done until request, the statute never begins to run until the request is made. 12 Petersd. Abr., 341. In the case now before us, there is nothing by which we can know when the ward became of age, and was capable in law of suing. It is highly probable, from what is shown, that he died a minor, and that no action ever accrued to him in his lifetime; therefore, the statute could not commence running until the cause of action accrued, and the party was capable in law of suing. Administration of his estate was granted to the complainant in *August*, 1828, and no cause of action could accrue to him until a demand of payment was made. The statute could not commence running until after the demand was made, because it was an executory trust, and no cause of action could arise, either to the ward or his administrator, until demand made. The demand appears not to have been made until a few days before the suit was brought. These facts, however, would have been matters of proof, if issue had been taken on the plea.

But be these facts as they may, the claim in this case does not come within the statute, and is not subject to its limitation, even in a court of law. The statute provides that it shall not be pleaded in bar of, or operate as a bar to, any action founded on an instrument or a contract in writing. This suit is bot-tomed on written receipts. These receipts are very special; they clearly show the trust and acknowledge the claim. They distinctly state that he, *John H. Rockafellar*, the guardian, received these several sums of money of the said administrator, *Kiger*, for the use of the said *Joseph Russell*, as guardian for him, the said *Joseph*, &c.; and they are duly signed with the proper hand and name of the said *John H. Rockafellar*.

[*86] These *receipts are, without controversy, instruments in writing, within the saving clause of the statute.

The third objection is, that the deposition of *Kiger* should have been rejected on the ground of interest. The appellants argue that inasmuch as *Kiger* was administrator of the estate out of which the *cestui que trust* claims his distributive share, and had the funds in his hands, and still will be liable for them unless it be established that he has paid them to this guardian,

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he is directly interested, and should not be allowed by his own oath to clear his skirts of the burthen, and bind it on the shoulders of another. This objection presents some difficulty. The rules to be found at different periods, in the books on the subject of incompetency by reason of interest, have frequently changed, and therefore present rather a strange confliction of judicial reasoning. In the case of *Bent v. Baker*, 3 Term Rep., 27, Chief Justice *Kenyon* said, that there had been various opinions on the subject, and that it was impossible to reconcile all the cases; that all the Court could do in any case was to consider what the general principles and good sense of the numerous decisions were, and extract from them a rule. He added that he thought the true principle was, if the proceedings in the cause could not be used as evidence for or against the witness, that he was competent, although his interest and wishes in the question might be ever so strong; that such interest and prejudice should go to his credibility, and not to his competency. No rule, however, can be more reasonable and salutary than that which requires the testimony by which any fact is to be established, to be free from that bias which an interest in the event might even imperceptibly give to the mind of the witness; but this rule, although so admirable in its principle, is perhaps of all rules the most flexible in its application. The voice of nature may be supposed to give a bias to the testimony of those who stand within the ties and influence of any of the domestic relations, and particularly that of parent and child; but such testimony is not rejected: it is a consideration which does not disqualify the witness, however it may weigh as to his credibility. The law conceives the claims of truth to be sufficiently strong to repress the most powerful feelings of nature, and the most powerful dictates of love and affection, existing even between parent and child, yet it [*87] will not trust the *interests of justice to the influence which the smallest actual or supposed pecuniary benefit may excite.

The old rule was, that a mere supposed or imagined interest, although in fact there might be no interest, would be sufficient

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to disqualify a witness. *Fotheringham v. Greenwood*, 1 Str. Rep., 129; *Richardson's Ex'or. v. Hunt*, 2 Munf., 148; *M'Veaugh v. Goods*, 1 Dall., 62; *Innis v. Miller*, 2 Dall., 50. In more modern times that rule has been maturely considered; the light of reason has been brought forward in aid of it, and it has undergone a great change. It appears to be now settled, that no interest will disqualify but an actual interest in the cause that can be enforced. It must be direct and such as immediately benefits or injures him; the record of which may be used as evidence for or against him, in any action to which he may afterwards be a party; or the record of which may create a new responsibility, which the law would recognize and render available either for or against the witness. In the case of *Twambly v. Henley*, 4 Mass., 441, Judge *Parsons* says, if the verdict will be evidence for or against the witness, it is an interest that will exclude him. Again, in the case of *Bliss v. Thompson*, 4 Mass., 488, the same great luminary of the law recognizes and re-asserts the principle, that if the verdict can be used as evidence for or against the witness, it will exclude his testimony. In the case of *Van Nuys v. Terhune*, 3 Johns. Cas., 83, the Court says the rule by which a witness is excluded on the ground of interest, seems to have fluctuated at different periods, but on a careful examination of all the authorities as well ancient as modern, the general rule may be said to be, that if the verdict cannot be given in evidence for or against the witness in any other suit, the objection goes to his credit and not to his competency.

The case of *Hayes v. Grier*, 4 Binn., 83, is directly in all its particulars, in principle and substance, like the one under consideration. The plaintiff, *Hayes*, was the treasurer of the county of *Lycoming*, and he brought an action against *Grier*, the defendant, for a sum of money which was due to the county for taxes from one *Phineas Bond*, the collector; which sum of money had been paid over to *Grier*, the defendant, by Mr. *Bond*, the collector, by the directions of the plaintiff, for the use of and in trust for the county, and *Grier*, the defendant, had failed to pay it over to the county. The

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[*88] plaintiff *attempted to prove that the money had been paid to the trustee, *Grier*, the defendant, by the said *Bond*, the collector; but *Bond's* testimony was objected to on the ground of interest. The Court said that the rule on the subject was this: If the verdict can be used as evidence for or against the witness in any subsequent suit that may be brought against him, or if the witness will be immediately benefited or injured by the event of the suit, it is an interest that excludes his testimony. Now, added the Court, Mr. *Bond's* testimony in the case tends immediately to discharge him from these taxes; for if the treasurer recover the amount from the defendant, *Grier*, the claim will be satisfied; and if a suit should be subsequently brought against Mr. *Bond* for the money, the verdict in this case may be given in evidence in discharge of Mr. *Bond's* liability. Mr. *Bond's* evidence was therefore rejected.

From this view of the case, we are satisfied that the deposition of *Kiger* should have been rejected. He was the first holder of the trust fund, and is still liable for it, unless he has paid it to the *cestui que trust*, or to his guardian. His testimony goes directly to discharge himself from that liability, and the decree in this case may be given in evidence by him, in any suit which may hereafter be brought against him on that claim.

The fourth and last error, is, that the decree should have been *de bonis testatoris* and not *de bonis propriis*. This error is also well assigned. The decree should have been *de bonis testatoris*.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

J. Ryman, for the appellants.

G. Holland, for the appellee.

Titus v. Scantling and Wife.

[*89] *TITUS v. SCANTLING and Wife.

ARBITRATION AND AWARD—VOID BOND.—If a bond is void by the laws of the State where it was made, and where the Court must presume (no other place being named) it was to be performed, it can not be enforced in this State.

SAME—COMMON LAW.—At common law any persons, though no suit was pending, might submit their matters of difference to arbitrators, and their agreement for the purpose might be without writing, or by writing either with or without seal.

[*90] COMMON LAW—PRESUMPTIONS AS TO.—The common law, so far as it does not interfere with the statutes of a State, must be presumed to be in force within such State (a).

ARBITRATION-BOND.—The arbitration-bonds, at common law, contained no agreement that the submission should be made a rule of Court.

SAME.—The *English* statute of Will. 3, and the statutes of *Ohio* and *Indiana*, relative to arbitrations, authorize the insertion of such an agreement into arbitration-bonds, and thus provide for a remedy by attachment against the defaulting party; but at the same time, these statutes do not impair the validity of arbitration-bonds which do not contain the agreement, and an action of debt still lies on such bonds at common law (b).

APPEAL from the *Shelby* Circuit Court.

BLACKFORD, J.—This was an action of debt by *Edward Scantling* and *Sarah*, his wife, formerly *Sarah M' Afee*, against *Joseph Titus*. The action is founded on an arbitration-bond, executed by *Titus* to the said *Sarah* previously to her marriage. The condition of the bond is, that if *Titus* should perform the award of certain arbitrators to be made within a limited time, relative to a certain matter of difference between the parties, then the bond was to be void. There is no agreement in the bond that the submission of the parties might be made a rule of Court, and that circumstance gives rise to the only question of law involved in this cause.

The declaration sets out the condition of the bond, the award, and the breach. The defendant pleaded three pleas.

(a) See *Smith v. Muncie National Bank*, 29 Ind., 158; 16 Id., 475; 1 Id., 24; 2 Id., 76; 10 Ind., 28; 12 Id., 102; 18 Id., 156.

(b) As to arbitrations at common law, see *Francis v. Ames*, 14 Ind., 251; *Hays v. Miller*, 12 Id., 187; 9 Id., 270; 5 Blackf., 423.

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The first plea is, that the bond was executed in the State of *Ohio*, and was to be there complied with, and that in *Ohio*, by virtue of a statute which is set out in the plea, the bond is void, in consequence of its not containing an agreement that the submission might be made a rule of Court. The second plea is a denial that any award had been made. The third plea is, that the award was obtained by fraud and covin. To the first plea the plaintiff filed a general demurrer. On the second and third pleas, issues were joined.

The demurrer to the first plea was sustained. The issues on the second and third pleas were tried by the Court without a jury, and damages assessed in favour of the plaintiffs to the amount of \$437. Final judgment was rendered for the penalty of the bond, with an award of execution for the damages and costs. The only error assigned is the sustaining of the demurrer to the first plea.

[*91] *The appellant contends, that the validity of this plea must be tested by the laws of *Ohio*; and that, according to those laws, the bond upon which the action is founded is void, as is shown by the plea.

It is admitted that if the bond is void by the laws of *Ohio*, where it was made, and where we must presume (no other place being named) it was to be performed, it ought not to be enforced here. That is the law, as stated by Judge *Story* in his "Conflict of Laws," pages 216, 217 and notes. It was also decided to be the law by this Court, in a case between these same parties, at the *May* term, 1834. The statute of *Ohio*, therefore, on the subject of arbitration-bonds must be examined. The language of that statute is as follows: That all persons, &c., may submit their controversies to arbitration, &c.; that when any persons agree to submit any matters to arbitration *as aforesaid*, and to make the same a rule of Court, they shall enter into arbitration-bonds, &c., which shall expressly state their agreement that the submission may be made a rule of Court; that if either party refuse to obey the award, the other party may return the same with the bond to the Court, &c., and obtain a rule of Court thereon; and that

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the party disobeying the rule shall be liable to be punished for a contempt, &c. This is the whole of the statute, contained in the defendant's plea, that has any relation to the case. There can be no doubt but that the bond upon which the present suit is founded, is not such a one as is contemplated by this statute, for the reason pointed out by the appellant; which reason is, that it contains no agreement that the submission shall be made a rule of Court. But the question is, does that circumstance make the bond void under the laws of *Ohio*?

To determine this question, it is necessary to advert, for a moment, to the history of arbitrations. They are, as every one knows, of common law origin. In the earliest periods of the history of that law, we find that any persons, though no suit was pending between them, might agree to submit their matters of difference to arbitrators; and that their agreement for this purpose might be without any writing, or by a writing without seal, or it might be by mutual bonds. If the agreement was by bond, and either party refused to comply with the award,

his opponent might sue him on the award or on the [*92] *bond. 2 Saund., 61, notes. We find in the old

English books of Reports, previously to any statute on the subject, frequent suits on arbitration-bonds. Those bonds contained no agreement, that the submission should be made a rule of Court. The insertion of such an agreement in the bond, originated with the *English* statute of 9th and 10th of Will., 3d. The object of that statute was to give to persons, submitting their disputes to arbitration where no suit was pending, the same remedy that the common laws gives in cases referred after the commencement of a suit. *Lucas v. Wilson*, 2 Burr., 701. The defaulting party, where the submission is made a rule of Court, becomes liable to an attachment. The statute thus gives a new remedy, when the bond contains an agreement for the rule; but, at the same time, it leaves the validity of the common law bonds, not containing such an agreement, entirely unimpaired. All the difference is, that on the statutory bond the rule of Court may be obtained, but on the common law bond it can not. The

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patry, in the latter case, is limited to the old remedy by an action on the award or on the bond.

These observations respecting the *English* law of arbitration, apply to the laws of *Ohio* on the subject. We are bound to presume that the common law, so far as it does not interfere with her statutes, is in force in *Ohio*. That point was so decided by this Court, in the case of *Stout v. Wood*, *July* term, 1820. Arbitration-bonds, therefore, in the common law form, without any agreement respecting a rule of Court, are valid in the State of *Ohio* by the common law, unless their validity is impaired by the statute law of that State. The defendant below has not informed us in his plea of any other statute of *Ohio* on the subject, than the one to which we have referred. That statute is, substantially, as to the matter in question, the same with the *English* statute of Will. the 3d; and it consequently does not, as is shown by our previous remarks, affect the legality of arbitration-bonds made, like the one now before us, in the common law form. The obligees are excluded, by the form of the bond, from the summary remedy by attachment under a rule of Court, but that does not prove the bond to be void, or that an action of debt may not be maintained on it.

The statute on arbitrations in *Indiana*, is, as to the matter under consideration, the same with the *Ohio* statute; [*93] and we *think it is clear that this arbitration-bond, had it been executed here with a view to our laws, might have been enforced in our courts as a common law bond, by an action of debt (1).

Our opinion for these reasons is, that the obligor's plea, that the bond in question is void by the laws of *Ohio*, where it was executed, can not be supported. The bond is valid, and the demurrer to this plea was correctly sustained.

Per Curiam.—The judgment is affirmed with five *per cent.* damages and costs.

P. Sweetser, for the appellant.

C. Fletcher and *O. Butler*, for the appellees.

(1) Rev. C. Ind., 1831, p. 72. Accord. Rev. Stat., 1838, p. 69.

GARWOOD and Another v. Cox, on Appeal.

A SUPERINTENDENT of school land, by a written contract without seal, leased to A, in 1824, a part of the land for ten years. *Held*, that as the contract was not under seal, and was for a longer term than the statute authorized, it did not enable a purchaser of the land in 1830, from the school commissioner, to sue A for a breach of the contract. *Vide* Stat., 1818, p. 301; 1829, p. 120.

The above-named contract did not show in what county the land was situate—its situation being only stated to be in township 15, range 8; and the declaration contained no averment to supply this defect. *Held*, that the declaration, were it otherwise good, would be objectionable for want of such an averment.

It was necessary for the declaration in the suit above-named to state that the lease (supposing it to be conformable to the statute) remained uncanceled; and that the trustees of the township had authorized the commissioner to sell the land, and that he had sold it accordingly to the plaintiff. It was also necessary for the declaration to show that the situation of the land, as to place, was such as to authorize the sale. *Vide* Stat., *supra*; *Trustees, &c., v. Miller*, 5 Ohio Rep., 184.

[*94] *JOHNSTON v. GLANCY and Others.

VENDOR AND PURCHASER—POSSESSION BY THIRD PARTY.—The purchaser of real estate in the possession of a third person, is bound to take notice of such person's title to the possession, whether his title be legal or equitable (a).

STATUTE OF FRAUDS—PAYMENT.—Payment of the purchase-money of real estate is not of itself a sufficient part performance to take a case out of the statute of frauds.

(a) *Atkinson v. Jackson*, 8 Ind., 94.

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SAME—POSSESSION.—The purchaser's entering into possession of the estate in pursuance of the contract, is sufficient to take the case out of the statute (b).

SAME.—But the mere continuance in possession of the premises, by a tenant after his purchase, is not sufficient for that purpose.

ERROR to the Shelby Circuit Court.

STEVENS, J.—*James H. Johnston* filed a bill in chancery against *Joseph Glancy, John Moore and John Glancy*, to obtain a legal title to a lot of land in the town of *Marion*, county of *Shelby*, and State of *Indiana*, numbered twenty-four on the plat of the town. The bill, answers and depositions establish the following facts:

In the month of *October*, 1831, and for some time before, the above-named *Joseph Glancy* was seized in fee of the above-described lot of land, on which there was a log cabin, part of the logs of which were hewed, and part scored but not hewed; that said *Johnston*, the complainant, lived in the cabin on the lot as tenant to the said *Joseph*; that about the first of *October*, 1831, the said *Joseph* sold the lot to *Johnston*, the tenant, for forty or forty-five dollars, which *Johnston* paid him in work; that *Johnston* remained in the uninterrupted possession from that time until the commencement of this suit, and still so remains in possession; that after *Johnston* had so purchased said lot, he put a shingled roof on the cabin, raised a frame house, made a board fence round the lot, and dug a well on the same; making permanent improvements worth the sum of eighty dollars, as estimated by the complainant, by the witnesses at not less than fifty dollars, and by the defendants at twenty-five dollars; that *Johnston* never held any contract in writing respecting the purchase, but the said *Joseph* was to have made him a deed, and the day was once fixed to make the deed, but the said *Joseph* failed to attend, and it was not made; that afterwards, on the 12th of *January*, 1833, the said *Joseph* conveyed the said lot, together with all his other real estate, consisting of lands, mills, &c., of great value,

(b) *Thompson v. Thompson*, 9 Ind., 323.

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[*95] to the above-named *John *Glancy*, his brother, and the above-named *John Moore*, his brother-in-law, and on the same day left the country and has never since returned; that the said *John Glancy* and *John Moore*, to whom the said *Joseph* conveyed, well knew, at the time of receiving the conveyance, of the possession and claim of the complainant, *Johnston*, of, in, and to, the premises in question.

In addition to these facts, the complainant alleges in his bill, that the conveyance by the said *Joseph* to the said *John Glancy* and *John Moore* was made without consideration, and was fraudulent; that it was made expressly to defraud the complainant out of his lot, and to defraud the creditors generally of said *Joseph*. As to this allegation there is no direct proof; but it is not denied by any of the answers of the defendants. Neither of them asserts, that any consideration whatever passed from the said *John Glancy* and *John Moore* to the said *Joseph* for the lots, lands, mills, &c., conveyed to them by the said *Joseph*.

The defendants, in their answers do not deny the sale of the lot to *Johnston*, but they deny his having paid for it. That fact, however, is clearly proved by all the witnesses.

The defendants rest their defense on the statute of frauds and perjuries, which they plead in bar, and on which they appear to rely with much confidence.

Previously to the filing of this bill, *John Glancy* and *John Moore*, the persons to whom the said *Joseph* had conveyed, commenced an action of disseisin against *Johnston*, the complainant, to dispossess him of the lot in dispute; and this bill was filed praying for a perpetual injunction against them, and for a decree compelling them to convey to him, the said *Johnston*, &c., and for general relief in the premises, &c. An interlocutory injunction was granted; but, upon a final hearing, that injunction was dissolved, and the bill dismissed at the costs of the complainant.

The only question of any weight in the case is, whether under all the facts presented by this record, a specific execution of this parol contract between *Joseph Glancy* and the

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complainant, can be enforced against the plea of the statute of frauds, pleaded and insisted on by the defendants?

Before entering into that question, we will notice a few minor objections raised by the defendants' counsel in argument.

[*96] *The defendants' counsel insists that the grantees, *Glancy* and *Moore*, cannot be affected by the equitable claim set up by *Johnston*; they being subsequent purchasers without notice of this parol contract. To this it may be answered, that that objection is not, as to matter of fact, sustained by the record. The complainant has expressly charged in his bill that these defendants are volunteers, and that they had notice of his claim. This charge they have not, either directly or indirectly, denied or traversed. They have tacitly admitted that they are volunteers, and have expressly admitted that they knew that the complainant was in possession of the premises in dispute; and it follows as a legal consequence, if they knew of his possession, they were bound to take notice of his title to that possession, whether it was legal or equitable. But that is not all; it is directly proven by one of the depositions that they knew that *Johnston* claimed the lot as his own. By these facts we are relieved from any difficulty as to that objection. These defendants cannot be viewed in the light of *bona fide* purchasers, for value, without notice. They have no protection that is not applicable to their grantor; they stand in his shoes, and as to the claim of *Johnston* are mere trustees (1).

The next objection is, that there is a variance between the bill, in several material allegations, and the proof; that it is stated in the bill that the complainant demanded a deed of the said *Joseph* before he left the country, and the proof is that he only demanded a bond for the deed; and that it is alleged in the bill, that the complainant purchased the lot in question for forty-five dollars, and that he duly paid the amount to the vendor, without averring how he paid it, and the proof shows that he paid it in work. This objection as to these supposed variances between the proof and the allegations is wholly

untenable. As to his making a demand of a deed, it is immaterial whether that charge is true or false; his right does not grow out of a demand; he was in full possession and at all times entitled to a deed, whether he demanded it or not. And as to the contradiction between the proof of payment and the allegation in the bill, there is none. The proof, it is true, goes something further than the bill: the bill simply asserts the fact of having paid the forty-five dollars, without stating how it

was paid; the proof establishes the fact of the payment of the forty-five dollars, and also *explains how it was paid; in this there is certainly no contradiction.

The next objection is, that the whole proof in the case, when taken together, is vague and uncertain. It is a well settled rule, in cases of this kind, that the contract, as laid in the bill, must be clear and satisfactory, not only as to the description of the land, but also as to the amount of the purchase-money, time of payment, &c., and the proof must be equally clear and satisfactory; that is, the whole proof, when taken together, must be such that the Court can satisfactorily see that the allegations of the bill are proven. *Sugd. on Vend.*, 77 to 90.

We can not, however, in this case, see either vagueness, confusion, or contradiction in the evidence. There are three depositions, and the whole three agree precisely. Some of the witnesses swear to many facts that the others know nothing about, but as to the facts of which they do know, there is a remarkable and striking harmony. The evidence to our minds is very clear, and well sustains the bill, and the bill is plain, direct and certain in all its allegations.

We now come to the main question respecting the statute of frauds. We here meet with objections that are not so easily disposed of. The importance of the questions raised is acknowledged, and the arguments of the defendants' counsel have been duly weighed and considered.

The statute of frauds, among other things, enacts: That all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in or out of, any messuages, lands, tenements, or hereditaments, made or created by livery and seisin

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only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall be only leases or estates at will, &c., except certain leases enumerated, and that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged thereby, or some person by him thereunto lawfully authorized (2). In *England*, and also in the several States of this Union, there are statutes in substance similar

this. The object of all such statutes is to prevent [*98] frauds and *perjuries; hence, in all cases where there appears to be an almost impossibility of the commission of those offenses, courts have endeavored to take them out of the statute and enforce their performance, although they may not be in writing. The statute was not intended to create or protect fraud, and therefore courts have taken many cases out of the statute, not entirely on the principle of there being no danger of perjury, but for the purpose of preventing one of the parties to a contract from committing a fraud on the other, under the sanction of the statute.

Courts of equity have determined, and it seems now to be the settled rule of decision, that parol agreements may be enforced if the agreement has been in part performed, provided such part performance be admitted by the party charged, or be satisfactorily proven. What acts amount to such part performance as will take a parol contract out of the statute, is not entirely clear of doubt. It was, for a while, held that the payment of part, or all of the purchase-money, was such part performance; but that doctrine is now entirely rejected. Payment in whole, or in part, is a strong auxiliary fact in establishing part performance, but it is not, of itself, sufficient (3). The ground upon which relief is granted in these cases is fraud, and the great leading principle by which courts are governed is, that there must be some act of performance done

that is palpable and evident to the senses of all—an act that can be relied on as certain, about which there can be no misunderstanding, and which does not rest solely in the recollection, understanding or belief of witnesses, such as absolute and visible possession of the premises, the actual building of houses, or the making of other lasting improvements. But even these acts of part performance must be done with a direct view of the agreement being performed, and be such acts as could be done with no other view, or the agreement will not be taken out of the statute.

If the purchaser was not previously in possession of the premises, and after the parcel purchase he enters upon the estate with the assent of the vendor, such possession is always held as part performance, and takes the case out of the statute; and much more so if, after he enters, he makes valuable and lasting improvements. But the taking of such possession

without the knowledge, consent or will of the vendor, [*99] will *not do. *Butcher v. Stapely*, 1 Vern. 363; *Lacon v. Mertins*, 3 Atk., 1; *Wills v. Stradling*, 3 Ves. jun., 378; *Bowers v. Cator*, 4 Ves. jun., 91; *Gregory v. Mighell*, 18 Ves. jun., 328; *Kine v. Balfe*, 2 Ball & Beat., 343; *Wilber v. Paine*, 1 Ohio Rep., 251; *Wetmore v. White*, 2 Caines' Cas., 87; *Givens v. Calder*, 2 Des., 171, 190; Sugd. on Vend., 77 to 80; *Tibbs v. Barker*, 1 Blackf., 58; *Morphett v. Jones*, 1 Swanst., 181; *Buckmaster v. Harrop*, 13 Ves. jun., 474 (4). But possession by a tenant, who was in possession of the premises as a tenant at the time of the purchase, and who remains in possession, is not considered a part performance; for a tenant, of course, may continue in possession until he has notice to quit; and therefore the mere act of his continuing in possession amounts to nothing, and will not take the case out of the statute. *Wills v. Stradling*, 3 Ves. jun., 378; *Savage v. Carroll*, 1 Ball & Beat., 265; *Anthony v. Leftwich*, 3 Rand., 238; 2 Hovend. on Fr., 3; Sugd. on Vend., 80.

In this case the complainant at and long before the time of making the purchase, was in possession of the lot as tenant to the vendor; therefore, his continuance in possession can not

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be considered as a part performance of the contract. There is some fluctuation in the decisions on this subject, and some contradiction in the books, as to how far courts of equity may go in taking parol contracts out of the statute; and some cases have gone further than the principles stated above would warrant. We, however, are not disposed to carry such cases beyond the clear medium of the chain of decisions which may be safely relied on; at that point we stop. In the case now before us we are satisfied that a specific execution of the contract should not be decreed; yet we think that the Circuit Court did wrong in dismissing the complainant's bill; he is entitled to relief, and justice requires us to grant it to him without further expense or delay. When the specific execution of a parol contract can not be decreed, by reason of the vendor's pleading the statute of frauds in bar of such decree, it is the duty of the Court to decree compensation to the complainant, to the amount of the purchase-money by him paid and interest thereon; and also for all beneficial and lasting improvements, which he may have made on the premises. 2

Hovend. on Fr., 4; Sugd. on Vend., 78 and n; [*100] *Anthony v. Leftwich*, supra; **Parkhurst v. Van Cortlandt*, 1 Johns. C. R., 273; *King v. Bardeau*, 6 Id., 38; *Kelly v. Bradford*, 3 Bibb, 317; *Phillips v. Thompson*, 1 Johns. C. R., 131; *Forster v. Hale*, 3 Ves., 713; *Greenaway v. Adams*, 12 Ves., 395. In this case, it is certain that the plaintiff has sustained an injury by the acts of the defendants, and his claims are sufficient to authorize the interference of the Court in securing adequate compensation.

Per Curiam.—The decree of the Circuit Court is reversed, with costs; and it is ordered, &c., that the complainant recover of *Joseph Glancy*, one of the defendants, the sum of ninety dollars, &c.; that the complainant retain possession of the premises till the said sum of ninety dollars and the costs be paid, &c.

T. Sweetser, for the plaintiff.

C. Fletcher and *O. Butler*, for the defendants.

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(1) *Daniels v. Davison*, 16 Ves. jun., 249; 2 Sugd. on Vend., 338; *Moreland v. Le Masters*, in this Court, Nov. term, 1837. But a purchaser, where the possession is vacant, is not bound to inquire of the late occupier what was the nature of his title, and therefore would not be held to have implied notice of the information which he might have obtained by inquiry. *Miles v. Langley*, 1 Russ. & Myl., 39; 2 Sugd. on Vend., supra.

(2) Rev. C., 1831, p. 269; Accord. Rev. Stat., 1838, p. 311.

(3) The authorities on this subject are contradictory. The opinion in the text is sustained by a late eminent writer, who says: "It seems formerly to have been thought, that a deposit, or security, or payment of the purchase-money, or of a part of it, or at least of a considerable part of it, was such a part performance as took the case out of the statute. But that doctrine was open to much controversy, and is now finally overthrown." 2 Story's Eq., 64.

The same writer, after stating some of the grounds why part payment is not deemed a sufficient part performance to take a case out of the statute, says: "But a more general ground, and that which ought to be the governing rule in cases of this sort, is, that nothing is to be considered as a part performance, which does not put the party into a situation which is a fraud upon him, unless the agreement is performed. Thus, for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser; and is liable to answer as a trespasser, if there be no agreement valid in law or equity. Now, for the purpose of defending himself against a charge as a trespasser, and to account for the profits in such a case, the evidence of a parol agreement would seem to be admissible for his protection; and if admissible for such a purpose, there seems no reason why it should not be admissible throughout. A case still more cogent might be put, where a vendor, upon a parol agreement for a sale of land, should proceed to build a house on the land, in the confidence of a due completion of the contract. In such a case, there would be a manifest fraud upon the party, in permitting the vendor to escape from a due and strict fulfillment of such agreement. Such [*101] a case is certainly distinguishable from that of part payment of the purchase-money; for the latter may be repaid, and the parties are then just where they were before, especially if repaid with interest. A man who has parted with his money, is not in the situation of a man against whom an action may be brought, and who might otherwise suffer irreparable injury 2 Story's Eq., 66.

(4) *Moreland v. Le Masters*, Nov. term, 1837, post.

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CRIMINAL LAW—INDICTMENT RECORD.—The record, in the case of an indictment, need not show that the indictment was signed by the prosecuting attorney, nor that there was a foreman of the grand jury.

INDICTMENT—JOINDER OF COURTS.—In an indictment, a count charging a robbery from A may be joined with a count charging an assault and battery with intent to rob A.

SAME—PRACTICE.—If an indictment for a felony contain several counts, and it be proved to be the design of the prosecuting attorney to convict the defendant of separate felonies, the court will compel him to elect upon which count he will rely. But the mere circumstance of there being several counts is not, of itself, sufficient to require such an election to be made (a).

CHALLENGE OF JUROR.—A petit juror, in a criminal case, being challenged and examined on his *voir dire*, testified that he had formed and expressed an opinion as to the guilt of the defendant from report; that he had heard no witness, as he knew of, speak of the transaction; that he lived eighteen miles from the neighborhood of the defendant, and had not been there since the alleged commission of the offense. *Held*, that the challenge was not sustained (b).

VERDICT—AMENDMENT OF.—If the verdict against the defendant on an indictment be informal, the jury may alter it on motion of the prosecuting attorney, with the consent and in presence of the court, so as to give it the form of a general verdict of guilty.

ERROR to the *Montgomery* Circuit Court.

BLACKFORD, J.—*M'Gregg* was indicted in the *Montgomery* Circuit Court. The indictment contains five counts. The first three counts contain charges of robbery from the person of *William Bennett*. The last two counts are for assaults and batteries on *William Bennett*, with an intent to rob him. The record of the cause commences as follows: Be it remembered that, at, &c., on, &c., before the judges, &c., by the oaths of *Richard Canine*, &c. (the other names are here inserted), the grand jurors for, &c., impaneled, charged and sworn to inquire in and for, &c., upon their oaths present, that *Amariah M'Gregg*, &c. The prisoner moved the Court to quash the indictment, but the motion was overruled. He then moved

(a) See *Weinzorpflein v. The State*, 7 Blkf., 186.

(b) *Morgan v. Stevenson*, 6 Ind., 169; *Bradford v. The State*, 15 Id., 347.

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[*102] *that the prosecuting attorney be required to elect to go to trial either on the counts in the indictment charging the defendant with robbery, or on those counts which charge him with an assault and battery with an intent to commit a robbery. This motion was also overruled.

The plea of not guilty was filed, and a jury called to try the cause. During the impanneling of the jury, one of the jurors was challenged by the prisoner, and was sworn to answer questions as to his indifference. He was asked by the prisoner the following question: "Have you formed and expressed an opinion as to the guilt or innocence of the defendant?" The juror answered as follows: "I have formed and expressed an opinion as to the guilt of the said defendant from report, but have heard no witness, as I know of, speak of the transaction. I live eighteen miles from the neighborhood of the defendant, and have never been in the defendant's neighborhood since the transaction complained of." The challenge was disallowed by the Court, and the juror was sworn in chief.

The jury found a verdict against the prisoner as follows: "We, the jury, find the defendant, *Amariah A. M'Gregg*, to be guilty of an assault and battery with an intent to rob. We further agree that he is guilty of grand larceny. We further adjudge him to be imprisoned for six years at hard labor in the State prison. We further agree to fine him in the sum of \$100." Upon this verdict being read by the clerk, the prosecuting attorney suggested to the jury to change their verdict as follows: "We, the jury, find the defendant, *Amariah A. M'Gregg*, guilty, and assess that he be imprisoned for six years at hard labor in the State prison, and fine him in the sum of \$100." This alteration was accepted by the jury, and the verdict so varied was given by them accordingly. The prisoner objected to the recording of the verdict thus varied, and to the rendition of judgment thereon. This objection was overruled; the verdict as altered was recorded, and a judgment rendered conformably to the verdict as finally given.

The first objection is, that it does not appear that the indictment was signed by the prosecuting attorney, nor that the

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grand jury had a foreman, nor that the grand jurors were sworn at the term when the bill was found. There is nothing in this objection. The record need not show that the [*103] *indictment was signed by the prosecuting attorney, nor that there was a foreman; and it does appear, with sufficient certainty, that the grand jurors were impaneled and sworn according to law.

The second objection is, that there is a misjoinder of counts in the indictment, and that it ought for that reason to have been quashed. The question raised by this objection is, whether a count charging a robbery from *A B* can be joined with a count charging an assault and battery with intent to rob *A B*? And we are of opinion that they may be joined. The offenses are of the same nature, and subjected by statute to the same punishment.

It is objected, in the third place, that the prosecuting attorney should have been compelled to elect, whether he would go to trial on the counts for robbery, or on those for an assault and battery with an intent to commit a robbery. Where there are two or more counts for apparently distinct felonies, as there legally may be in many instances, it cannot be a matter of course, as the plaintiff in error contends it is, for the defendant to compel the prosecutor to elect on which single count he will go to trial. If that were the case, it would at once render nugatory the established and legal practice of inserting several counts in an indictment for felony. There could be no possible use in inserting several counts, if the defendant could, in effect, have them all but one struck out of the indictment. The truth is, the different counts in an indictment for felony, are usually drawn with a view to one and the same transaction; and the object of inserting several counts is, that some one of them may be found, on the trial, to be in accordance with the evidence. This is a legitimate object, and the Court will never, in such a case, interfere with the proceeding. It sometimes happens, no doubt, that the prosecutor's object in inserting several counts, is really to prosecute the defendant for *separate* felonies by means of one indictment. This he has

no right to do, and when it is ascertained before the trial that he intends to do it, the Court will defeat his design. But to enable the defendant to defeat the prosecutor's intention of trying him for separate offenses, it lies upon the defendant to show the existence of such an intention. It was the want of proof of such intention which prevented the prisoner, in the case before us, from obliging the prosecutor to elect [*104] upon *which of the counts in his indictment he would rely. The prisoner rested his motion on the single fact, that there were several counts in the indictment; but that circumstance was no evidence, of itself, that the prosecutor's object was to prove separate offenses.

The plaintiff in error, as to this matter. refers us to a case in *Durnford & East's Reports*. Justice *Buller*, in that case, uses the following language: "In misdemeanors, the case in *Burrow* (984) shows that it is no objection to an indictment that it contains several charges. The case of felonies admits of a different consideration; but even in such cases it is no objection in this stage of the prosecution (after verdict). On the face of an indictment, every count imports to be for a different offense, and is charged as at different times. And it does not appear on the record, whether the offenses are or are not distinct. But if it appear before the defendant has pleaded, or the jury are charged, that he is to be tried for separate offenses, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defense, or prejudice him in his challenge of the jury; for he might object to a juryman's trying one of the offenses, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge who tries the prisoner, does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed. But if the case has gone to the length of a verdict, it is no objection in arrest of judgment." *Young and Others v. The King*, 3 T. R., 105. These observations of Justice *Buller* are very satisfactory, but they are not in favour of the plaintiff in error. It does not appear by the record

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before us, that the Court was furnished with any information, independently of the indictment, that separate offenses were to be tried.

The next error assigned is, that the Court committed an error in overruling the challenge to the juror. The juror testified, "that he had formed and expressed an opinion as to the defendant's guilt from report; but that he had heard no witness, as he knew of, speak of the transaction; that he lived eighteen miles from the neighborhood of the defendant, and had never been in the defendant's neighborhood since the transaction complained of." The plaintiff in error contends,

that this statement shows that the juror was not [*105] competent to sit on *the trial of the cause. The *English* law upon this subject is, that if the juror has declared that the prisoner is guilty, or will be hanged, or the like, the declaration if made out of ill-will to the party is a good cause of challenge; but if the declaration was made from the juror's knowledge of the cause, it is no ground of challenge. 2 Hawk. Pl. Cr., 418; *The King v. Edmonds*, 4 Barn. & Ald., 471. The latter part of this doctrine, viz., that if the juror's opinion arises from his knowledge of the case, it is not a cause of challenge, is disputed in the case of *Ex parte Vermilyea*, 6 Cowan's R., 555.

In support of the challenge, the plaintiff in error relies principally on the opinion of Ch. Justice *Marshall*, in the trial of *Burr*, and the opinion of Justice *Woodward* in the case of *Ex parte Vermilyea*, to which we have already referred. In *Burr's* trial, the Ch. Justice, in the course of his remarks, says, "That light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony; constitute no sufficient objection to a juror; but that those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him." 1 *Burr's Trial*, 416. In the case of *Ex parte Vermilyea*, the juror testified that he had

heard the evidence at a former trial of the cause, and had made up his mind perfectly that the defendants were guilty; and that he had frequently expressed this opinion. He stated further, that he felt no bias against the defendants; that if the testimony on the present trial should appear as it did on the former, he should certainly find them guilty; but that he thought he was competent to give a verdict according to his oath and the evidence. The Court of Oyer and Terminer, in the city of *New York*, overruled the challenge; but Justice *Woodward* afterwards, on an application for the allowance of a *certiorari*, decided against the competency of the juror. That case is not much like the one before us. The Judge, however, in his opinion cites a decision of Chief Justice *Spencer*, in a case of murder, which applies very strongly to the case we are considering. It is in these words: "If a person had formed or expressed an opinion for or against the prisoner, on a knowlegde of any of the facts attending the murder, [*106] or from information *of those acquainted with the facts, he considered it a good cause of challenge; but if the opinions of the jurors were formed on mere rumors and report, he decided that such opinions did not disqualify the jurors." This decision is approved of by Justice *Woodward*, and it met, as he says, with the decided approbation of the Supreme Court of *New York*.

The statute which we have on this subject enacts, "That it shall be lawful for a defendant, or the Court, to require jurors to answer on oath, whether they have formed or expressed an opinion relative to the guilt or innocence of such accused person, and from the answer to such question, and to such others as may be asked by the permission of the Court, the competency of such jurors shall be determined upon by the Court." Rev. Code, 1831, p. 197. We consider that, under this statute, when the juror answers that he has formed or expressed an opinion of the defendant's guilt, there are other inquiries to be made before the juror can be set aside. The nature and cause of the opinion must be inquired into. If it appear from the answers of the juror, or from any other

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testimony, that he has formed or expressed an opinion of the defendant's guilt out of ill-will to the prisoner, or that he has such a fixed opinion of the defendant's guilt, as will probably prevent him from giving an impartial verdict, the challenge ought to be sustained. But if the opinion be merely of that light and transient character, so commonly formed when we hear any reports of the commission of an offense, such an opinion merely as would probably be changed by the relation of the next person met with, it is not a sufficient cause of challenge.

In the case under consideration, the juror's opinion was occasioned merely by reports. There was no proof that the opinion proceeded from ill-will to the defendant, or that it was so firmly settled as to justify a belief that the juror would not do the defendant justice. The challenge, therefore, could not be sustained.

The last error assigned is, that the verdict was improperly amended, and that the amended verdict is consequently void. We do not see any thing in the transaction alluded to that is sufficient to avoid the verdict. The indictment contains two sets of counts; the first set for robbery; the second for an assault and battery with intent to rob. The jury found the defendant guilty of the charge contained in the second [*107] set of counts, and also of grand larceny. The punishment assessed by the jury was adapted to the charges in the indictment. There was no charge of larceny. Under these circumstances, there was no error in the prosecuting attorney's ascertaining from the jury, in the presence of the Court and with its permission, whether it was a general verdict of guilty which they intended to find, and in his presenting them with the form of such a verdict, to be disposed of as they might think proper.

There is no error in the proceedings of the Circuit Court in this cause, and the judgment must be affirmed.

Per Curiam.—The judgment is affirmed with costs.

A. S. White and D. Wallace, for the plaintiff.

W Herod, for the State.

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LICENSE—CONSTITUTIONAL LAW.—The statute imposing a fine upon any person who shall, without having a license as required by law, vend any foreign merchandise within this State, is not in violation of the constitution of the *United States* (a).

ERROR to the *Bartholomew* Circuit Court.

M'KINNEY, J.—*Beall* was indicted for selling, by retail, one-fourth of a pound of tea, without having a license or permit to vend foreign merchandise, which it is averred the tea was. He demurred to the indictment, and the demurrer being overruled, judgment was rendered against him. He complains of this judgment as erroneous, and contends that the act of the legislature on which the prosecution is founded is repugnant to the constitution of the *United States*, and therefore void.

The section of the act to which exception is taken reads as follows: "Every person who shall in proper person, or by an agent, vend any merchandise which may not be the product of the *United States*, without having a license or permit so to do, as is or may be designated by law, shall be fined in any sum not exceeding \$100." R. C., 1831, p. 191 (1). It is confidently believed that no conflict or repugnance exists between

this provision and the powers delegated to the General [*108] *Government. It is, however, urged that it is an assumption by the State of a right to reach a subject of taxation which, by the constitution of the *United States*, is committed exclusively to Congress. The question made, if it were for the first time before a judicial tribunal, would unquestionably be of peculiar importance, and demand the most rigid examination; for it is supposed that of all questions that arise under the various forms of government which exist, none excite greater interest or prompt to more close investigation

(a) So decided in the recent case of *Word v. The State of Maryland* (Court of Appeals). Reported in July No., 1870, American Law Register.

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than those which affect the subject of taxation, whether founded on the extent of the burthen or the right to impose it.

The question now before us, when first made in the highest tribunal in the country, was investigated with labor and patience, and its decision sustained by a lucid, elaborate and convincing argument. It has also been decided by the Appellate Court of a sister State. When we say decided, we do not wish to be understood as expressing the opinion that the particular point before us has been decided, but that the question decided in those cases was decisive of the principle involved in this. The question is not therefore clothed with its original interest, and our examination of it will be limited.

That part of the constitution of the *United States* (art. 1, sec. 10), to which the act of the legislature is supposed to be repugnant, is as follows: "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." This provision of the constitution, in the decision of the Supreme Court of the *United States* to which we referred (*Brown v. The State of Maryland*, 12 Wheat., 419), was fully expounded; and as that case is relied upon in support of the objection to the indictment, it is proper to turn our attention to the point decided by it. The *Browns* were indicted on a statute of *Maryland*, subjecting "importers of foreign articles or commodities of dry goods, wares or merchandise, by bale or package, &c., and other persons selling the same by wholesale, bale or package, &c., to penalties, who did not before they sold, &c., take out a license." They were indicted as importers, and charged with having imported and sold one package of foreign dry goods without having a license to do so. They demurred to the indictment in the inferior court in which the prosecution was instituted, and on

[*109] *judgment being given against them, which was affirmed by the Appellate Court of the State, they took the case by writ of error to the Supreme Court of the *United States*. That Court, Ch. Justice *Marshall* delivering its opinion, reversed the judgment of the Court of Appeals of

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Maryland, on the ground that the act of that State, on which the indictment was founded, was repugnant to the constitution of the *United States*, and void.

Between the act of *Maryland*, thus pronounced void, and the act of this State, the validity of which is questioned, there seems to be an immeasurable difference. The act of the former State assumed the right of levying a tax on imports, without bringing that tax within the constitutional exception, whereas that of this State is only the exercise of a rightful and undenied power of taxing its citizens, and the property within it, without obstruction to the powers of congress. Without remarking further upon this act, the broad ground is taken, and, it is believed, can be successfully maintained, that this State, situated as it is, can not pass an act that would be repugnant to the provision of the constitution of the *United States* which we have quoted. No port of entry for the introduction of foreign imports has been established by Congress within the State. The State itself has not undertaken to establish one. It, therefore, without having a port of entry, could not lay a tax on imports, for such a tax must meet its subject, as laid down by Ch. Justice *Marshall*, in the case of *Brown*, before its incorporation with the great mass of property in the State, for then its distinctive character as an import is lost. It becomes, from the moment of such incorporation, the legitimate subject of taxation. An act of this State can only affect such property, and opposes no obstruction to any power granted to congress.

It is believed that there is no other provision of the constitution of the *United States*, to which this act, after a moment's reflection, can be supposed to be repugnant, except it be to that which gives to Congress the power to regulate commerce between the States. Our act does not interfere with the exercise of that power. It contemplates no restriction upon such commerce; it imposes no burthens upon it; nor can it be tortured into a transit duty. The power it asserts is inseparable from sovereignty essential to its existence, and one which all expounders of the constitution admit to have been [*110] reserved. *The State would become a mere appanage

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of the general government unless this power was possessed. Upon a point thus clear, argument seems to be unnecessary.

Per Curiam.—The judgment is affirmed, with costs.

P. Sweetser, for the plaintiff.

W. Herod, for the State.

(1) Accord. Rev. Stat. 1838, p. 217.

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VENDOR AND PURCHASER—FALSE REPRESENTATIONS BY VENDOR.—Debt on a sealed note for the payment of \$100. Plea, that the note was given in part consideration of a certain half quarter section of land, received by the defendant from the plaintiff in exchange for another tract; that at the time of the contract, and to induce the defendant to make it, the plaintiff represented to him that he had measured the half quarter section of land, and that it included a certain field, and a certain piece of bottom land containing fifteen acres; that the defendant, ignorant of the boundaries of the land, and relying on the plaintiff's representation, made the exchange and gave the note; that the defendant has since discovered that the land so received by him does not include the field or bottom land, and that it is not worth as much by \$200 as it would have been had its situation been as the plaintiff represented it.

Held, on demurrer, that the plea was a bar to the action.

SAME.—If the vendor of real estate undertake to point out to the purchaser the boundaries of the land, or the place where it lies, or its improvements, he does it at his peril, and is liable for any mistake in the description (a).

ERROR to the *Rush* Circuit Court.

STEVENS, J.—Debt upon a writing obligatory for the payment of \$100. Plea, failure of consideration. Demurrer to the plea; demurrer sustained, and final judgment for the plaintiff.

The plea avers that the consideration on which the writing obligatory is founded was a part of the difference in value, which *Cowger* undertook to pay the *Gordons* in an exchange

(a) *Port v. Williams*, 6 Ind., 219.

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of two certain half quarter sections of land, which were exchanged between them, containing eighty acres each, &c.; the *Gordons*, at the time of the exchange, for the purpose of inducing *Cowger* to make the exchange, and also [*111] pay the *difference in value asked of him in exchange by them, pointed out and represented to *Cowger* that they had measured the land, and that the west and south lines extended so as to include a certain field, and also a certain bottom containing fifteen acres of land; that *Cowger* being wholly ignorant of the lines, relied upon the statements of the *Gordons* and made the exchange, &c.; that *Cowger* has since discovered that the west and south lines of said half quarter section do not include the said field, nor the said fifteen acres of bottom; and that the said half quarter section is worth \$200 less than it would have been, had it included the said field and the said bottom land.

The demurrer to the plea is special, and assigns for cause of demurrer that the plea neither charges a warranty nor a *scienter*.

The question before us is as to the sufficiency of the plea. This plea shows that *Cowger* got the right half quarter of land, that is, the one he contracted for, and that it contains the proper number of acres; but charges that he was deceived as to where its west and south lines would run; that the mistake injures him to the amount of \$200; and that notwithstanding the half quarter section of land which he has got is the correct one, so far as the numbers and the quantity are concerned, yet he has not got the land which the vendor showed and sold to him. It is not, however, charged in the plea that the *Gordons* knew that they showed the wrong land to *Cowger*; it is not charged that they knew that this field and piece of bottom containing fifteen acres were not included within the lines of the half quarter. It may be that the *Gordons* honestly believed that they stated the truth. Nor does the plea allege that the *Gordons* warranted that those lines would enclose this field and bottom.

The counsel for the *Gordons* insist that there must be either

a *scienter* or a warranty laid; that the subject-matter was a mere opinion about which the *Gordons* had a right to express their belief; and that they can not be held accountable for that belief, unless at the time they knew it was false, or unless they expressly warranted the fact to be true; that *Cowger* was not bound by their opinion; that he ought to have ascertained the truth for himself; that by the use of ordinary care and diligence he could have known the truth of the case, and that the law required of him to do so.

[*112] *In the sale of goods and chattels, the rule is well settled that *caveat emptor* applies with all its force, and the buyer purchases at his peril with regard to the quality or goodness of the commodity; and that the vendor is liable for no defect in these particulars, unless he make an express warranty, or be guilty of fraud. The rule is, if there is no express warranty or fraud on the part of the seller, the buyer must abide all losses from defects of quality, soundness, goodness, &c. The seller is not bound to point out facts affecting the value of the commodity, if the means of information are equally in the power of the buyer. The seller, however, must not commit a fraud on the buyer, by using undue means or craft to prevent him from discovering the defects. Each party in these transactions judges for himself, and must rely on his own skill and judgment. Sugden's Vend., 1, 2; 2 Kent's Comm., 478, 484, and notes.

The rule, *caveat emptor*, applies to defects in the quality and goodness of real estate; and even in some special cases to the title also. Sugd. Vend., 1, 2, 210; *Sherwood v. Salmon*, 2 Day, 128; *Moore v. Turbeville*, 2 Bibb, 602; *Lowndes v. Lane*, 2 Cox, 363; *Oldfield v. Round*, 5 Ves., jun., 508; *Shirley v. Davis*, 6 Ves., jun., 678, cited; 1 Ball & Beat., 250, 506. But in the sale of goods and chattels the rule is very different, as it respects the title. If the vendor is in possession of the commodity sold, and points it out to the vendee as his, the rule *caveat emptor* as to title does not apply; the law implies that the seller warrants the title. The same implied warranty must exist in the sale of real estate, so far as the identity of

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the estate shown to the purchaser comes in question. If *A* holds a patent from the *United States* for the northwest quarter of a certain section, and is negotiating a sale of it to *B*, and in attempting to show it to *B* accidentally, and by sheer mistake, shows him the southwest quarter, and neither of them is cognizant of the mistake; yet if *B* should purchase the land named in the patent, supposing it to be the land *A* had showed to him, and take a deed of conveyance from *A*, he could rescind the contract as soon as the mistake should be discovered; although the purchaser might, by strict diligence, have ascertained before the purchase that he had been shown the wrong quarter. It has been frequently decided, that if a vendor when treating of a sale of real estate, make a [*113] *representation which is not true in fact, though he believed it to be so when he made it, a performance cannot be compelled. 2 Hov. on Fr., 9; *Higginson v. Clowes*, 15 Ves., 516; *Wall v. Stubbs*, 1 Madd., 54; *Waters v. Mattingley*, 1 Bibb., 244.

The case of *M'Ferran v. Taylor*, 3 Cranch, 270, settles that principle. The case was this: *Taylor* held a military warrant for military services, for one thousand acres of land upon a branch of the *Licking* river. The land had never been surveyed, and it was not known to any one where the lines would run. *Taylor* supposed that the warrant included a branch called the *Hingston* fork, on which the land was rich and valuable. He sold to *M'Ferran* five hundred acres of the land contained in the warrant, to be laid off to *M'Ferran* in a square or an oblong on any side or end of the one thousand acres that *M'Ferran* might choose, so soon as the one thousand acres should be surveyed. *Taylor* represented to *M'Ferran* that it lay on the *Hingston* branch. When it came to be surveyed, it lay upon the *Slate* branch, where lands were poor and not valuable. At the time of the sale, it was possible by a sufficient examination to have known the truth of the case; and if sufficient diligence and caution had been used on the part of *M'Ferran*, he might have ascertained on which of these branches the land would lie; but he did not do so. He saw

proper to take *Taylor's* word, and made his contract accordingly. Judge *Marshall*, when disposing of the case, said, *Taylor* represented the land in his warrant to lie on the *Hingston* fork of *Licking*, when in truth it lay on the *Slate* fork, where lands are much less valuable than on the *Hingston* fork; that this is a material misrepresentation cannot be denied; but, said he, it is urged that there is no fraud, and as the contract relates only to the land contained in the warrant, *Taylor* was not accountable for the place where the land might lie when surveyed; that the mistake was accidental, and at the time had no influence on the contract. This apology, he said, is no doubt strictly true, but that does not furnish a legal justification for *Taylor*. He sold the property and pointed out where it lay, and he is liable for the mistake he has made. He sold that which he did not own, and must answer for his inadvertence in damages.

The case of *East v. Matheny*, 1 Marsh., 192, is directly in point. *East* sold *Matheny* two lots in the town of *Nicholasville*, and in pointing out the lots to *Matheny*, he [*114] represented *that they included a certain post and rail fence, and some other improvements which they did not. This representation was entirely a mistake on the part of *East*, as it was proved on the trial. *East* really supposed that his representation was true; and *Matheny*, if he had chosen so to do, could have ascertained for himself where the lines of these lots did run; but he did not do so. He purchased and gave his notes for the payment of the purchase-money, and before he paid the notes the mistake was discovered; and on a suit upon the notes, *Matheny* set up the damages which he had sustained by that mistake, as a set-off to so much of the purchase-money, and it was allowed him by the Court.

We think these cases settle the case before us. If a person sell real estate simply by the description contained on the face of his title papers, he is not accountable for its location, its lines, &c.; but if he undertake to point out to the purchaser the lines, or the place where it lies, or its improvements, he

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does it at his peril. If he make a mistake it is at his own loss. The rule *caveat emptor* cannot apply. When the vendor undertakes to point out and show the particular premises, the lines, the improvements, &c., to the vendee, the law implies a warranty that he is pointing out and showing the true and identical premises, lines, improvements, &c., that he is selling; and if he make a mistake he must be accountable.

The plea in this case is not very skillfully drawn; but it is sufficient to bar the action, if the principles above laid down are correct, and of that we have no doubt. Whether *Cowger's* loss was one hundred dollars, or more or less than one hundred dollars, we know not; he avers it is two hundred dollars, and that is sufficient under the demurrer to bar the whole action. If the plaintiffs had taken issue on the facts alleged, the truth of the statements, as well as the amount of the defendant's damages, would have been determined by the jurors, from the evidence which might have been adduced upon the trial.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Rariden, for the plaintiff.

O. H. Smith, for the defendants.

[*115] RAY and WIFE v. DOUGHTY and Another, Administrators, in Error (a).

THE final settlement of the accounts of executors and administrators in the Probate Court is considered *prima facie* correct; and the settlement can only be interfered with by a Court of Chancery, in very clear cases of mistake or fraud. *Allen v. Clark*, 2 Blackf., 343 (a).

The administrator of an administrator is not administrator of the first intestate, nor has he a right to administer any of the goods of such intestate; but it is his duty to make a

(a) See *Riser v. Snoddy*, 7 Ind., 442.

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settlement with the Probate Court, of the business done by his intestate in the first administration.

If one of the co-administrators of an estate die, the administrator of the deceased is the proper person to pay any balance due to the estate from such co-administrator, and the surviving co-administrator is the proper person to receive it.

It appeared, on the settlement of an estate in the Probate Court, that the payments which had been made by the administrator, amounted to \$3,010. *Held*, that an allowance to the administrator of \$180, as commissions, was not objectionable as being too high.

The Probate Court, on the settlement of an estate of which *A* and *B* were administrators, had charged *A* with only \$3,010, although the inventory and sale-bill, signed by both the administrators, amounted to a much larger sum. *Held*, that the record of the Probate Court, in the absence of all proof, except the inventory and sale-bill, was conclusive proof that the sum charged to *A* was the whole amount that had come into his hands to be administered.

An executor may be passive, by not obstructing his co-executor from obtaining the assets, without making himself responsible even to the creditors of the testator. *Langford v. Gascoyne*, 11 Ves., 333 (b).

The widow and administratrix of *A*, being in the nineteenth year of her age, received from her co-administrators, *B* and *C*, certain goods as her legal portion of her deceased husband's estate. *Held*, that in case the widow committed a devastavit of the goods, and it be considered that *B* and *C*, by the delivery of them to her, had contributed to that
 [*116] devastavit, *B* and *C* *may be liable to the creditors of the intestate for such delivery of the goods, but they can not be liable for it to the widow herself.

Held, also, that whilst the letters of such infant administratrix remained unsuspended and unrevoked, the payments made to her by the debtors of the intestate, and the delivery of goods

(1) *Davis v. Walford*, 2 Ind., 88; *Braxton v. The State*, 25 Id., 82.

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of the estate to her by her co-administrators, are to be considered in the same light as if her authority were undisputed. 1 Williams on Ex'rs, 371.

The granting of letters of administration is a *judicial* act, and where the Court granting them has jurisdiction, individuals and Courts of justice are bound to respect the authority of the letters, and to presume *omnia rite acta*. *Westcott v. Cady*, 5 Johns. Ch. R., 334.

An administratrix took into her possession a part of the assets with the knowledge of her co-administrator, and converted them to her own use. *Held*, that though the administratrix was a minor, her co-administrator was not liable for the devastavit.

An administrator is liable for any interest he may have collected on the debts due to the estate.

A Court of Chancery may take the opinion of a jury as to any of the facts in controversy between the parties, whenever it thinks proper to do so.

HEDLEY v. THE BOARD OF COMMISSIONERS of Franklin County.

COUNTY COMMISSIONERS—APPOINTMENT OF OFFICERS.—The statute authorizing the board of commissioners of any county in which the office of recorder becomes vacant by death, resignation, removal, or otherwise, to appoint some person to supply the vacancy until the next general election, is not unconstitutional (*a*).

SAME.—The board of county commissioners can not create a vacancy in the office of recorder, but when such vacancy has occurred, they may declare its existence, and make an appointment to supply it, in conformity with the statute (*b*).

APPEAL FROM COUNTY BOARD—PRACTICE.—In the case of an appeal to the Circuit Court, from the judgment of a board of county commissioners, the

(*a*) See *City of Lafayette, etc., v. Jenners*, 10 Ind., 70.

(*b*) *Yonkey v. The State*, 27 Ind., 226; 19 Id., 336.

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cause must be re-tried on the merits; and it will be presumed by the Supreme Court to have been so re-tried, if the record show nothing to the contrary, and the Circuit Court have given a final judgment in the case (c).

[*117] ERROR to the *Franklin* Circuit Court.

M'KINNEY, J.—The board of commissioners of *Franklin* county, at its *May* term, 1833, made the following order: “It appearing to the satisfaction of the board that the office of recorder for the county of *Franklin*, and State of *Indiana*, is vacant, in consequence of the removal of *John Hedley*, the late incumbent of said office, the board appoints. &c.” From the decision of the board an appeal was taken to the Circuit Court, and that court was moved to aside set and quash the proceedings of the commissioners on the following grounds: 1. That the board of commissioners had no authority to declare the office vacant. 2. That the board of commissioners had no jurisdiction or power to appoint a recorder for said county. 3. That the said *John Hedley* had no notice of the examination of the said matter, and that no charges were exhibited against him. Several errors are assigned as having been committed by the Circuit Court, the principal of which is, its having rendered final judgment on overruling the motion to set aside and quash the proceedings of the board of commissioners.

We will examine the several points which have been made by the plaintiff in error, pursuing the order in which they were presented.

1. The most serious question that has been discussed relates to the constitutionality of the act which authorizes the board of commissioners, in their respective counties, in which “the office of recorder shall become vacant by death, resignation, removal, or otherwise,” to appoint some suitable person to fill the same, who shall continue in office until the time of the next general election. Stat., 1832, p. 263 (1). This statutory provision is said to conflict with the 10th sec., 11 art., of the constitution of the State, which provides for the election of a

(c) *Purviance v. Drover*, 20 Ind., 238; 7 Id., 471; 6 Id., 292; 1 Id., 79; 5 Blackf., 594

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recorder in each county, and that, therefore, the office of a recorder can only be filled by election, as provided for by the constitution.

The filling a vacancy in an office until the period of the next general election does not seem to be opposed to the constitutional requirement that such officer should be elected. The exercise of this power is essential to prevent great and obvious injury to the community. The preservation of the records is secured, and the duties of the office performed. The vacancy is to be filled by an appointment, not for seven years, [*118] the *constitutional term of service of a recorder, but until the next general election. If the legislature had authorized the appointment of a recorder for the term of seven years, or for a term that would deprive the electors of the county from filling the office by the exercise of their franchise at the earliest period, then the objection would have been well taken. The mode of filling the vacancy was a mere question of expediency, and by committing it to the officers of the several counties the least possible delay has been avoided. Although the authority is not given by the letter of the constitution, yet to deny its implication and its exercise would be to oppose those sound rules of construction which have been adopted by the most enlightened courts in the exposition of constitutional provisions.

The exercise of the power by the legislature, of authorizing vacancies in offices to be filled by appointment until the next general election, is not confined to the office of recorder. It extends to sheriffs and coroners, each of which officers the constitution requires to be elected by the qualified electors in each county; yet the legislature has, from its first session, required the Governor to fill vacancies in those offices which may have occurred "by death, resignation, removal from office, &c., until the next general election, and until a successor be duly elected and qualified into office." It is true, that the exercise of this latter authority, if not warranted by the constitution, would not sustain its exercise in the case of the recorder. But the cotemporaneous exposition of a constitution, or of a law, is .

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entitled to great respect, and courts, when such exposition has been judicial, rarely feel justified in departing from it. Such exposition by the legislative branch of the government, though not obligatory upon a co-ordinate branch, the judiciary, must be viewed by the latter with great respect; and when concurring legislative expositions for a series of years, unquestioned and undenied, are adduced in support of the constitutionality of an act, they afford at least strong and persuasive arguments in its support.

We are satisfied that upon this point there has been no violation of the constitution, and that the power given to the boards of commissioners could well be executed.

2. It is said that the board had no authority to declare the office vacant.

By the statute, it is expressly made the duty of the [*119] board "when the office of recorder is vacant, to appoint, &c. The vacancy which it is competent to fill must arise "by death, resignation, removal or otherwise." The order of the board, which is before us, does not create the vacancy in the office of recorder, to which it was unequal, for the vacancy had previously occurred; but it simply states that "it appearing to the satisfaction of the board that the office of recorder, &c., is vacant in consequence of the removal, &c., the board appoints, &c." The board by this order does not create a contingency upon which it can act, but declares that the event had occurred upon which its action became necessary. The distinction is palpable between creating a vacancy and declaring that a vacancy had taken place. The former power, when not voluntary or by death, in relation to a recorder in this State, pertains only to the Senate when acting judicially; and the latter, to any agent the Legislature selects to fill a vacancy. We do not think it material, in the decision of the case, to enter into a critical examination of the import of the word "removal," used in the statute and in the order of the board, to locate its import on a change of domicile by removing from the county, or on the operation of a judgment of the senate as a judiciary tribunal. It is sufficient,

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that "removal" was the foundation of the action of the board, and that it is sustained by the statute.

The third point, from the view taken of the case, would seem to be disposed of, and will therefore receive only a passing notice. From the positions assumed in this opinion, it must follow that the board could not create a vacancy, but only act when one had occurred. To have itself preferred charges against the incumbent of the office, or to have permitted the exhibition of charges, would have been an assumption of the power of determining their truth or falsehood, and rendering a judgment upon such finding. This, we have seen, it was not in the power of the board to do; consequently notice was not a legal right.

We think that none of the reasons urged to the Circuit Court were sufficient to set aside or quash the proceedings.

We have now reached the proceedings in the Circuit Court, and shall proceed to examine the principal error assigned. The case was taken to the Circuit Court on appeal, and it is a fair construction of the statute authorizing the appeal, [*120] that it should be tried on its merits; that this was done we are bound to presume, and that the defendant was permitted to introduce proof is as necessary a presumption. The record does not show the evidence before the Circuit Court, nor does it show that the defendant offered testimony which was rejected. If such was the fact, the defendant should, in his bill of exceptions, have stated it, and have introduced the testimony he offered. This has not been done, and we can not suppose that his bill of exceptions presents less in his favour than the case warranted.

Per Curiam.—The judgment is affirmed with costs.

J. Ryman, for the plaintiff.

O. H. Smith, for the defendants.

(1) Accord. Rev. Stat., 1838, p. 470.

Coombs v. Newlon and Another.

COOMBS v. NEWLON and Another.

INDEMNITY BOND—PLEA IN BAR.—To debt on a bond executed upon the issuing of a writ of *ne exeat*, a plea that the defendant had paid the costs and that the writ had issued upon good cause, is a bar to the suit.

SAME.—In an action on such a bond, *non damnificatus* is not a good plea.

ERROR to the *Washington* Circuit Court.

STEVENS, J.—Debt by *Coombs* against *Newlon* and *Mead*, on a penal bond.

The facts are these: On the 25th of *December*, 1832, *Newlon* and *Mead* applied to a justice of the peace for a writ of *ne exeat* against the said *Coombs*; and in compliance with the statute on that subject filed the bond in question, conditioned as the law directs, that they would pay the costs that should accrue on said writ, &c., and that they would also pay all damages that *Coombs* might be entitled to, in case they had procured the issuing of said writ without cause.

On the penal part of this bond *Coombs* declared, without setting out the condition, or assinging any breaches of the condition. The defendants after craving *oyer* of the bond and condition, and spreading them upon the record, pleaded [*121] two *pleas in bar. The first plea, after setting out the proceedings before the justice of the peace, and showing that the *ne exeat* issued and was served upon *Coombs*, and that he appeared to it before the justice of the peace, &c., and gave the security required, &c., avers that they, the said *Newlon* and *Mead*, did pay all the costs that accrued on the said writ of *ne exeat* and proceedings thereon; that they had cause to procure the issuing of said writ; and that it was not issued without cause, &c. Second plea, *non damnificatus*. To each of these pleas the plaintiff demurred; the demurrer to the first plea was sustained; and that to the second plea overruled; and final judgment rendered for the defendants.

The judgment of the Circuit Court must be reversed. The opinion is erroneous as it respects both the pleas.

The first plea is sufficient in substance, and the demurrer

it should have been overruled. The statute requires, that such bonds shall be conditioned for the payment of the costs, &c., and also for the payment of the damages that the defendant may be entitled to in case the writ should issue without cause; and the plea avers that the obligors did pay all the costs that accrued on the writ, and that they had cause to procure the writ to issue, and that it did not issue without cause. Now if that plea is true, the plaintiff has no cause of action. If the obligors had cause to issue the writ of *ne exeat* and have paid the costs, they have complied with the condition of their bond, and also with the requirements of the statute.

The second plea is insufficient, and the demurrer to it should have been sustained. When the condition of a bond is merely to indemnify, the plea of *non damnificatus* may do; but if the condition stipulates for the performance of any particular act, performance of that act must be averred. The condition of this bond specially requires the costs to be paid, &c., and also provides for indemnity (1).

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the filing of the pleas set aside. Cause remanded, &c.

C. Dewey and *H. P. Thornton*, for the plaintiff.

I. Naylor; for the defendant.

(1) A general mode of pleading is often sufficient, where the allegation on the other side must reduce the matter to certainty. An illustration [*122] of this *rule is afforded by the plea of *non damnificatus* in an action of debt on an indemnity bond, or bond conditioned “to keep the plaintiff harmless and indemnified,” &c. This is in the nature of a plea of performance; being used where the defendant means to allege that the plaintiff has been kept harmless and indemnified, according to the tenor of the condition; and it is pleaded in general terms, without showing the particular manner of the indemnification. Stephen’s Pl., 359, 360.

Non damnificatus is a good plea to an action on a bond conditioned to indemnify the plaintiff and save him harmless. 1 Chitt. Pl., 569. But it is not a good plea in any other case. *M’Clure v. Erwin*, 3 Cowen, 313, 332. Instead, however, of the general negative plea of *non damnificatus*, in a suit on a bond of indemnity, the defendant may plead *affirmatively*, that he had saved harmless, &c.; but such a plea must show how the defendant had saved the plaintiff harmless, or it is bad on special demurrer. 1 Will. Saund., 116, note.

Allen v. The State, on the Complaint of Harrell.

When the defendant, in a proper case, pleads *non damnificatus*, and there is any damage, the plaintiff must show the damage by his replication. 1 Will. Saund., 117, note.

The plea of *non damnificatus* is proper in debt on a bond, conditioned to indemnify the overseers of the poor against the charges which might be imposed on them from the maintenance of a bastard child. *Richards v. Hodges*, 2 Saund., 83. It is a good plea, too, in a suit on a bond conditioned to indemnify a sheriff for giving up goods levied on, and returning the execution *nulla bona*. See the plea in such a case, a replication to it specially setting forth the plaintiff's damage, and a rejoinder taking issue of plaintiff's having sustained damage. 5 Wentw., 528—531.

But it is not a good plea when the bond sued on is given for the payment of a sum of money by the defendant to a third person, in exoneration of the plaintiff's liability to pay the same sum. *Holmes et al. v. Rhodes*, 1 Bos. & Pull., 638. And in debt on the bond of a deputy sheriff to his principal, for the faithful discharge of his duties and for rendering a true account, &c., *non damnificatus* is not a good plea. *Andrus v. Warring*, 20 Johns. Rep., 153. So, in an action on the bond of a gaoler conditioned for the safe keeping of the prisoners, the defendant can not plead *non damnificatus*. *M'Clure v. Erwin*, 3 Cowen, 313.

If the condition of the bond be to discharge or acquit the plaintiff from a particular thing, the plea of *non damnificatus* will not apply; but the defendant must plead performance specially, and show the manner of the acquittal and discharge. But if the condition be to discharge and acquit the plaintiff from any damage by reason of a certain thing, *non damnificatus* may then be pleaded, that being the same thing with a condition to indemnify and save harmless. 1 Will. Saund., 117, n.; Stephen's Pl., 362.

ALLEN v. THE STATE, on the Complaint of HARRELL.

BASTARDY—PRACTICE.—If the judgment of a justice in a case of bastardy be rendered against the defendant in his absence, and be not complied with, the justice must certify the case to the Circuit Court for a final determination. And if, in such case, the defendant reside in another county, *123] the process for his appearance in the *Circuit Court to answer the charge, may be directed to the county in which he resides.

SAME.—The Circuit Court, in such a case, may render a judgment for such sum or sums of money as it thinks proper for the maintenance of the child, and also a judgment for costs; but the damages for the seduction of the mother, or the expenses of her lying-in, are not recoverable in this prosecution.

Allen v. The State, on the Complaint of Harrell.

APPEAL from the *Fayette* Circuit Court.

BLACKFORD, J.—*Cassandra Harrell*, an unmarried woman, and resident in *Fayette* county, made a complaint before a justice of the peace in that county that she had been there delivered, a short time previously, of an illegitimate child; that the child was living, and that *Hiram Allen* was its father. The justice, on this complaint, issued a warrant in the name of the State against *Allen* as the reputed father, requiring his appearance before the justice to answer to the complaint. The constable returned that the defendant could not be found in *Fayette* county. The justice then, in the absence of the accused, examined the mother of the child on oath respecting the complaint, and committed the examination to writing. He also made an order that the accused was the father of the child, that he should make a satisfactory compensation to the mother, and should enter into a bond to indemnify the county. This order not being complied with, the justice certified his proceedings to the Circuit Court of the county.

When these proceedings of the justice were filed, the Circuit Court, on the plaintiff's motion, ordered a *capias ad respondendum* to issue against the defendant, directed to the sheriff of *Tippecanoe* county, where, as stated in the complainant's affidavit, the defendant resided. The defendant attended at the term to which the process was returnable, and moved the Court to set aside the proceedings, but the motion was overruled. A plea of not guilty was afterwards filed, a jury impaneled, and a verdict of guilty found against the defendant. The Court thereupon rendered a judgment as follows: It is considered by the Court that the defendant is the reputed father of the said bastard child, and that he pay into Court in hand the sum of twenty dollars, to defray the expenses of the lying-in of said *Cassandra* with the said child, the sum of twenty dollars within three months from this date, ten dollars within six months from the expiration of the first [*124] three months, and ten *dollars at the expiration of every six months thereafter, until he shall have paid the whole sum of \$160, should the child so long live, but the

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payments hereafter to be made to cease with the death of the child, should it die before that time, and that the said money be paid over to the clerk of this Court for the maintenance of the said child, to be paid by him to the person who may have the legal custody thereof, and that the defendant do give good security for the performance of this order, to the acceptance of the said clerk. It is further considered by the Court that the plaintiff recover against the defendant her costs and charges in and about her prosecution in this behalf expended, &c.

The appellant relies upon two grounds for a reversal of this judgment.

The first is, that the Circuit Court had no jurisdiction of the case, and that the motion to set aside the proceedings was, therefore, erroneously overruled. We do not perceive any error in the overruling of this motion. The statute relative to illegitimate children expressly authorizes the justice, if the accused can not be taken, to proceed with the trial in his absence. Rev. Code, 1831, p. 285. It also authorizes the justice, if his order against the accused be not complied with, to recognize him to appear at the next term of the Circuit Court, at which the cause is to be tried. As the defendant was absent, he could not be recognized; but as the proceedings against him in his absence were warranted by the statute, and he had not complied with the order, it was the duty of the justice to certify the cause to the Circuit Court, in order that it might there receive a final determination. The papers filed by the justice in the Circuit Court contained, *inter alia*, a written accusation, under oath, against the accused, a return of the warrant that he was not to be found in *Fayette* county, and a judgment of the justice that he was guilty. Under these circumstances, the process of the Circuit Court for the defendant's appearance was directed to the county in which he resided, and we think it was rightly so directed. In the case of an indictment or outlawry for any offense, and the defendant is resident in another county, there is a statute expressly authorizing a writ for his apprehension, to be directed to that county. Rev. Code, 1831, p. 140. The case before us,

Morrison v. King, in Error.

[*125] *as to the issuing of process to another county, is within the spirit of that statute, and the writ which issued against the defendant ought not to be objected to.

The second objection to the judgment is, that the Court erroneously adjudged that the appellant should pay a certain sum for the expenses of the lying-in of the complainant. This objection is well founded. The statute only authorizes, in this proceeding, a judgment against the defendant for such sum or sums of money as the Court may direct for the maintenance of the child, and a judgment for costs. The damages for the seduction of the mother, or the expenses of her lying-in, are not the objects of this kind of prosecution. The law has, in those cases, provided other remedies. The judgment of the Circuit Court, therefore, so far as respects the twenty dollars to defray the expenses of the lying-in, is reversed, and the sum of \$160 inserted in the judgment is accordingly reduced to \$140. The residue of the judgment is affirmed.

Per Curiam.—The judgment is reversed in part, &c. Cause remanded, &c.

J. Ryman, for the appellant.

O. H. Smith for the appellee.

MORRISON v. KING, in Error.

SCIRE FACIAS by a justice of the peace, to show cause why an execution should not issue on a judgment, rendered by his predecessor in office against the defendant. Plea, payment. Judgment for the plaintiff, and an appeal to the Circuit Court.

Held, that, on the trial in the Circuit Court, the defendant might prove *by parol* that he had paid the judgment to the justice before whom it was rendered; it being proved that, at the time of the payment, the justice was in office and had the docket in his possession, but that he had made no entry in it of the payment.

[*126] *HUNTER v. HARRIS and Another, in Error.

TRESPASS for breaking the plaintiff's close and taking away his goods. Pleas, 1. Not guilty. 2. That *Harris* was a justice of the peace and had rendered a judgment against the plaintiff at the suit of the other defendant; that the trespass was committed by a constable under an execution issued on that judgment, &c. Issues were joined, and the cause was submitted to the Court. The plaintiff proved the trespass; but the defendants, as to the justification, gave no evidence whatever that *Harris* was a justice of the peace. Judgment below for the defendants.

The Court reversed the judgment at the defendants' costs, and remanded the cause for another trial.

GIST and Others v. CICOT.

ASSUMPSIT—PLEADING.—If a declaration for goods sold and delivered allege the goods to have been sold for a stipulated price, and then state a promise to pay the worth of the goods, alleging them to be worth the sum previously stated, it is bad on special demurrer.

ERROR to the *Cass* Circuit Court.

BLACKFORD, J.—This is an action of assumpsit for goods sold and delivered. The declaration is to the following effect: For that whereas the defendant, &c., in consideration that he was indebted to the plaintiffs in the sum of \$116, for divers goods, &c., before that time sold and delivered to him and at his request, undertook and then and there promised the plaintiffs to pay them so much money as the goods, &c., were worth. And the plaintiffs aver that the goods, &c., were worth \$116. Yet the defendant hath not paid, &c. Special demurrer to the declaration and judgment for the defendant.

This declaration commences in the form of a count in *indebitatus* assumpsit. It states that the goods had been sold to

Malaby v. Hinkston, in Error.

the defendant for a certain sum of money, to wit: for [*127] \$116. *But when the declaration comes to set out the promise, it abandons the previous description of the contract, and alleges that the defendant's promise was to pay for the goods; not a specific price, but what they were worth; and it then avers that the goods were worth \$116. So that this latter part of the declaration is in the form of a *quantum valebant* count.

The incongruity in these two parts of the declaration renders the count objectionable, at least in form. It is not in proper form as a declaration in *indebitatus* assumpsit, because the promise is alleged to be for the payment of *what the goods were worth*. And it is not good, in form, as a *quantum valebant* count, because in setting out the consideration of the promise, it alleges that the goods were sold for *a stipulated price*.

The demurrer to the declaration sets out the objections to it, and was correctly sustained by the Circuit Court.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

A. S. White and H. Chase for the plaintiffs.

C. W. Ewing and S. C. Sample, for the defendant.

MALABY v. HINKSTON, in Error.

THE Circuit Court overruled the appellee's motion to dismiss an appeal. The motion was founded on the affidavit of a third person of his belief that the appeal-bond was not executed within the time required by the statute. The record and bond showed on their face that the bond was executed and filed in time. *Held*, that the motion was correctly overruled.

The plaintiff in the case of an appeal from the judgment of a justice in his favour, was a non-resident when the cause was called in the Circuit Court. *Held*, that he might be required to give security for costs, though he was a resident when he commenced the suit, when the judgment was rendered, and when the appeal was taken.

M'Cracken v. Gregory, in Error.

[*128] *ROBINSON, Assignee, v. BROWN, in Error.

A PROMISSORY note, executed by *Ryland T. Brown* and *Alexander Gregg*, and payable to *Joseph S. Burr*, was endorsed by the payee as follows: "Mr. Gregg: Pay the within to *Jesse Robinson*. (Signed) *Joseph S. Burr*." Held, that this endorsement did not transfer the legal ownership of the note to *Robinson*, and authorize him to maintain a suit on it against the makers, or either of them, in his own name.

ADAMS v. BEEM and Another, in Error.

IF the defendant in a court of error rely upon a release of errors, the release must be specially pleaded (1).

(1) To an assignment of errors the defendant may plead or demur. Pleas in error are common or special. The *common* plea, or *joinder*, as it is more frequently called, is *in nullo est erratum*, or that there is no error in the record or proceedings; which is in the nature of a demurrer, and at once refers the matter of law arising thereon to the judgment of the Court. *Special* pleas contain matters in confession and avoidance, as a release of errors, or the statute of limitations, &c., to which the plaintiff in error may reply or demur. 2 Tidd's Prac., 1150, 1154.

M'CRACKEN v. GREGORY, in Error.

TRESPASS *vi et armis*. Plea, not guilty. At the *October* term, 1833, the cause, by a rule of Court, was referred to arbitration. At the *October* term, 1834, the arbitrators returned their award, by which they merely say that they find for the defendant. The plaintiff being then called and not answering, the suit was dismissed at his costs. The plaintiff sued out a writ of error, and the judgment was affirmed with costs.

The State, on the relation of Robinson v. Littlefield and Others.

[*129] *THE STATE, on the relation of ROBINSON v. LITTLEFIELD and Others.

JUSTICE OF THE PEACE—SUIT ON OFFICIAL BOND—PLEADING.—In a declaration against a justice of the peace and his sureties, on the official bond of the justice, it is not a sufficient assignment of a breach to State generally, that the justice had not faithfully discharged his duty; but the breach of some particular duty, of which breach the relator has a right to complain, must be set out.

SAME—LIABILITY OF SURETIES.—The sureties in such a case are not liable, unless the act complained of was done corruptly, or with a knowledge that it was unlawful.

ERROR to the *La Grange* Circuit Court.

BLACKFORD, J.—This was an action of debt in the name of the State, on the relation of *Robinson*, against *Littlefield*, *Newton* and *Thrall*. The action is founded on a bond given by *Littlefield*, as a justice of the peace, and by *Newton* and *Thrall*, as his sureties, in the penal sum of \$1,200. The declaration sets out the condition of the bond, and assigns the breaches complained of. The condition is, that if *Littlefield* shall faithfully perform his duties as a justice of the peace, according to law, and pay over all money which may come into his hands to the persons entitled to it, then the bond to be void. General demurrer to the declaration, and judgment in the Circuit Court for the defendants.

The question between the parties in this cause is, whether there is any sufficient breach assigned in the declaration?

The first breach assigned is, that *Littlefield*, whilst acting as a justice of the peace, did not faithfully perform his duties as prescribed by law. This assignment is bad. It does not show that *Robinson*, the relator, has any cause of complaint against the defendants. The justice may have violated his duty a hundred times, without giving the relator in this case any reason to complain. Besides, this assignment does not show in what the magistrate's misconduct consisted. The covenant relied on is, in general terms, for the faithful performance of official duties; and the assignment in such a case should be of

The State, on the relation of Robinson v. Littlefield and Others.

a breach of some particular duty embraced in the covenant. The defendant must be informed, by the declaration, of the specific charge against him, in order that he may be prepared to answer it.

The other breach assigned is that, on, &c., at, &c., [*130] the said *justice issued a *capias ad respondendum* against the relator, on a charge of his having assaulted the justice; that the relator was accordingly arrested and brought before the same justice; that the justice unlawfully and oppressively refused to the relator a change of venue in the cause, and also refused him a trial by jury; that the justice, for the supposed assault upon himself, rendered a judgment for three dollars, with costs, against the relator; and, further, that during the said trial, the justice, without cause, fined the relator three dollars and costs, for an alleged contempt, issued an execution against him for the same, and thereby caused him to be imprisoned for twenty-four hours.

This assignment is also insufficient. Assuming the justice to have acted oppressively and unlawfully, as the declaration alleges, still that does not show a cause of action against the sureties. The declaration should have stated, that the justice had acted corruptly, or that he knew his conduct to be unlawful. In cases of this kind, the sureties are not liable for the unintentional mistakes in judgment made by the justice, however oppressively such mistakes may have operated against the party complaining. The plaintiff relies on the case of *The State v. Flinn*, in this Court, Nov. term, 1832. But in that case the acts of the justice are alleged to have been corruptly committed, and to have been committed with a full knowledge that they were illegal.

We are, therefore, of opinion, that neither of the breaches assigned is sufficient, and that the demurrer to the declaration was correctly sustained.

Per Curiam.—The judgment is affirmed with costs against the relator. To be certified, &c.

H. Cooper, for the plaintiff.

C. W. Ewing and *S. C. Sample*, for the defendants.

Phillips v. Phillips.

[*131]

*PHILLIPS v. PHILLIPS.

DIVORCE—ADULTERY—CONDONATION.—A husband can not claim a divorce on account of the adultery of his wife, if he cohabit with her after his knowledge of the offense.

ERROR to the *St. Joseph* Circuit Court.

M'KINNEY, J.—*Anthony Phillips* filed a petition praying a divorce from his wife, the plaintiff in error, on the charge of adultery. The testimony upon which the divorce was granted is made a part of the record. It appears that the adultery of the wife was proved, and that the fact was communicated to the husband, who nevertheless continued to cohabit with her for some time after, and even during the period that the summons, in this case, was in the hands of the officer. No question is better settled than that “subsequent cohabitation with the wife, with the knowledge of her guilt, is a remission of the offense, and a bar to a divorce.” *Williamson v. Williamson*, 1 Johns. Ch. R., 488; 2 Kent's Comm., 2d ed., 100.

The Circuit Court should have dismissed the petition at the costs of the plaintiff (1).

Per Curiam.—The decree is reversed, with costs. Cause remanded, &c.

W. Herod and *S. C. Sample*, for the plaintiff.

H. Cooper, for the defendant.

(1) It does not necessarily follow that a party applying for a divorce, on the charge of adultery, will succeed upon proving the truth of the charge. The Court will refuse a divorce, notwithstanding such proof, in the following cases:

1. If the complainant has been guilty of a similar offense. The plea in such case of recrimination or *compensatio criminum*—a set-off of equal guilt on the part of the complainant—is founded on the principle that a man can not complain of the breach of a contract which he has himself violated. *Beeby v. Beeby*, 1 Hagg. Ecc. Rep., 789; *Crewe v. Crewe*, 3 Id., 123. And this defense is good, though the complainant's offense was not committed until *after* that of the defendant. *Proctor v. Proctor*, 2 Hagg. Con. Rep., 292; *Brisco v. Brisco*, 2 Adams' Ecc. Rep., 259.

2. If the complainant has forgiven the offense. This forgiveness may either be express, or it may be implied from the fact of subsequent cohabita-

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tion after knowledge of the offense. Such cohabitation, however, is not so strictly a bar against the wife as it is against the husband. *Beeby v. Beeby*, 1 Hagg. Ecc. Rep., 789; *Wood v. Wood*, 2 Paige, 108. The forgiveness of the offense is called *condonation*, and there is an implied condition annexed to it by the party as follows: "You shall not only abstain from adultery, [*132] but shall in future *treat me, in every respect, with 'conjugal kindness.' On this condition, I will overlook the past injuries you have done me." If this condition be broken by subsequent adultery or cruelty, the adultery committed previously to the condonation is revived, and will be the foundation for a divorce. *Durant v. Durant*, 1 Hagg. Ecc. Rep., 733.

3. If the adultery was occasioned by the active procurement or passive toleration of the complainant. Connivance and collusion destroy all claim to a remedy by way of divorce. This is founded on the obvious principle that no man has a right to ask relief from a court of justice for an injury which he was chiefly instrumental in effecting himself. *Volenti non fit injuria*. *Harris v. Harris*, 2 Hagg. Ecc. Rep., 376; *Moorsom v. Moorsom*, 3 Id., 87; 2 Kent's Comm., 3d ed., 100.

SMITH v. SMITH, in Error.

ACCORDING to the statutes of 1833 and 1835, the courts of chancery have exclusive jurisdiction in cases of divorce: the consequence is that the associate judges can not, constitutionally, determine such a case in the absence of the Circuit Judge. Cons., Art. 5, Sec. 3 (1).

(1) Accord. Rev. Stat., 1838, p. 242.

DEMAR v. SIMONSON.

OVERSEERS OF THE POOR—POWER TO BIND APPRENTICES.—The overseers of the poor are not authorized to bind out poor children as apprentices, unless their parents are dead, or are unable to support them.

SAME.—If the indenture of the overseers show that it was executed in a case not warranted by the statute, it is void, and parol evidence is inadmissible

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in such case to show that the indenture was executed on a different ground from that which the indenture itself describes.

SAME.—Whether, when the indenture does not state the ground upon which the overseers acted, parol evidence be not admissible to show that the case is within the statute, *quære*.

APPEAL from the *Clark* Circuit Court.

M'KINNEY, J.—To a writ of *habeas corpus* issued on the petition of *Vickey Demar*, a woman of color, claiming the custody of her son, *Charles Demar*, of the age of ten [*133] years and *six months, charged to be illegally detained by *John S. Simonson*, the defendant made the following return: “In pursuance of the within command, I am ready to produce the within named colored boy *Charles Lindsey*, alias *Charles Demar*, and state as the cause of his caption and detention by me, that he is my apprentice bound to me by his own consent, and now living with me by his own consent, by an indenture of the overseers of the poor for the township of *Charlestown*, dated, &c., within which township said boy was living at the date of said indenture, and had been so living long before; and I herewith produce a certified copy of the said indenture.” The case was submitted to the Circuit Court, and it having heard the testimony, remanded the boy to the custody of *Simonson*. To reverse that judgment this appeal is prosecuted.

The case presents the single question: Is the indenture of apprenticeship, executed by the overseers of the poor, legal and valid? If, upon examination, it should appear that the overseers of the poor exercised such an authority as is conferred upon them by the statute, *Simonson's* custody of the boy must be sustained; but if, on the contrary, it should manifestly appear that they acted without the authority and sanction of law, the opposite conclusion is inevitable. The 7th sec. of the act for the relief of the poor, R. C. 1831, p. 381, authorizes overseers of the poor to “put out as apprentices all poor children, whose parents are dead, or whose parents shall be found by the said overseers unable to maintain them,” &c. There are thus presented two grounds upon which the overseers can

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act. 1. On the death of the parents of poor children. 2. On their inability to maintain them. When either of these exists, the authority of the overseers of the poor may be exercised (1).

The indenture of apprenticeship they executed is made a part of the return, and it may determine the question before us. It shows that the overseers "bind out, at his own request, a colored boy known by the name of *Charles Lindsey*, who has been for a few months past in the care of one *B. Grinton*, a man of color, and that he, the said *Grinton*, having informed the said overseers that he meant to remove from the county and State aforesaid, and is unwilling to maintain and keep said colored boy, wishes said overseers of the poor to bind him out, or deal with him as their discretion may best dictate." By

this authority alone, it seems the overseers of the poor [*134] bound *the boy to *Simonson*. That the indenture is illegal and void, there can be no doubt. Neither the consent of the boy, nor the wish of *Grinton*, who does not appear to have any legal control over him, could furnish a legal ground of action to the overseers which is not afforded by the statute. They were limited in the exercise of the power to bind out poor children, to the two classes of cases prescribed by the statute, and their authority beyond those cases could not be extended.

The counsel for the appellee would repel this conclusion, and asks us to indulge the presumption, in the absence of testimony on the record, that defects, if found in the indenture, were supplied in the Circuit Court. This can not be done. On the face of the indenture itself, the overseers of the poor show a case not within the statute, and assume that case as the ground of their execution of the instrument. We should have to presume *ad libitum*, to presume that the Circuit Court admitted such illegal testimony.

Whether in the absence in the indenture of the ground upon which the overseers acted, parol evidence could be adduced to show that they acted in a case warranted by the statute, is another and different question upon which we are not called upon for an opinion.

Vest v. Weir and Another.

It is very clear that the Circuit Court erred in the judgment it rendered in the case.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. H. Thompson, for the appellant.

C. Dewey, for the appellee.

(I) Accord. Rev. Stat. 1838, p. 431.

SANDFORD v. SHELBY, Administratrix.—In Error.

WHEN exhibits are the foundation of a suit in chancery and their execution is not admitted, they must be proved either by depositions, or *viva voce* at the hearing (1).

(1) In *New York*, exhibits of all kinds, viz., deeds, letters, &c., may be proved *viva voce* at the hearing, provided satisfactory reasons be given why they were not proved in the regular way before the examiner, and [*135] provided due notice have been given to the opposite party of an intention to make such proof at the hearing. *Consequa v. Fanning*, 2 Johns. C. R., 481.

When an exhibit is proved *viva voce* at the hearing, the witness may be cross-examined under the direction and discretion of the Court. *Ibid*.

In *England*, to authorize the proof of an exhibit *viva voce* at the hearing, an order for that purpose must be previously obtained, and a copy of the order must be served on the opposite party. 1 Newl. Ch. Pr., 285.

Such proof is allowed only on the application of the party who is to use the exhibit, but not on the application of the opposite party. *Graves v. Budget*, 1 Atk., 444; 2 Madd. Ch., 427.

A subpoena may be obtained to enforce the attendance of the witness to prove an exhibit *viva voce* at the hearing. 2 Madd., *supra*.

VEST v. WEIR and Another.

VOLUNTARY PAYMENT—CAVEAT EMPTOR.—A person being in possession of eighty acres of land belonging to the *United States*, upon which he had

Vest v. Weir and Another.

erected a mill, but to which land he had no claim, sold his possession for \$350 and received the purchase-money. He informed the purchaser, at the time of the contract, that he had no title and that the land belonged to the *United States*. The purchaser afterwards sued the vendor, in *indebitatus assumpsit*, to recover back the purchase-money. *Held*, that the action could not be sustained (a).

ERROR to the *Washington* Circuit Court.

BLACKFORD, J.—This was an action of *indebitatus assumpsit* brought by *Weir* and *Weir* against *Vest*. The declaration contains a count for money lent and advanced, and money paid by the plaintiffs to the defendant, and for money had and received by the defendant for the plaintiffs, and also a count on an account stated. Damage, \$500.

A bill of particulars, filed by the plaintiffs, states their demand to be as follows: “*William Vest*, jun., to *Hugh* and *Joseph Weir*, Dr.: To the amount of the consideration paid by the said *Weirs* to the said *Vest*, for which he was to convey to the said *Weirs* the west half of the north-west quarter of section number two, in township number three, north of range number two east, containing eighty acres; the said *Vest* never having had any title to the same, and having wholly failed to make any title, it being wholly out of his power to do so, \$350. Also, to interest on the above, &c.”

To this action the defendant pleaded non assumpsit. Verdict in favor of the plaintiffs for \$350. The defendant
[*136] *moved for a new trial, but the motion was overruled and judgment was rendered for the plaintiffs on the verdict.

The plaintiffs complain that the defendant contracted for the future conveyance to them of a certain tract of land; that they paid the consideration-money, and that the defendant, having no title, had failed to make the conveyance. They state, further, that considering themselves authorized to disaffirm the contract, they have brought an action of *indebitatus assumpsit* to recover back the money paid by them to the defendant.

(a) See this case discussed in *Major v. Brush*, 7 Ind., 232. See 2 Id., 526

 Wibrigh v. Wise.

The substance of the evidence, according to a bill of exceptions, is as follows: "The defendant was in possession of the land mentioned in the bill of particulars, on which there was a saw mill erected by him. The defendant was a trespasser on the land, without any pretense or color of title. He sold his possession to the plaintiffs for \$350, telling them at the time that he had no title to the premises, and that the land belonged to the *United States*. This evidence does not support the action. The money for which the action is brought is not proved to have been paid on such a contract as is described by the bill of particulars.

There is also another reason why no action will lie in this case. The record shows that the payment made by the plaintiffs to the defendant for his possession of the land was a *voluntary* payment with a full knowledge of all the facts. The money was not paid by mistake. There was no fraud in the transaction, nor was there any warranty either expressed or implied. When money is paid under circumstances like these it can not be recovered back.

The evidence, therefore, does not support the verdict, and the defendant was entitled to a new trial.

Per Curiam.—The judgment is reversed, and the verdict set aside with costs. Cause remanded, &c.

H. P. Thornton, for the plaintiff.

J. Rowland, for the defendant.

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*WIBRIGHT v. WISE.

CAPIAS AD RESPONDENDUM—**MOTION TO SET ASIDE**.—The motion of a defendant to set aside a *capias ad respondendum*, must be made as early after the return of the writ as is convenient and practicable, according to the rules of the Court; and before he has taken any step in the defense of the suit (a).

(a) *Swift v. Woods*, 5 Blackf., 97; Id., 278; 7 Ind., 447; 8 Id., 576. See Davis' Ind. Digest—title Appearance.

Wibright v. Wise.

SAME.—If a *capias ad respondendum*, concluding with the words, “Witness *A B*, clerk of the — Circuit Court,” &c., be in every respect formal, except that it have not the clerk’s signature at the close of the teste, it is sufficient under the statute.

APPEAL from the *Madison* Circuit Court. The *capias ad respondendum* in this case, issued by the clerk with the seal of the Court affixed, concluded as follows: “Witness *Robert N. Williams*, clerk of the *Madison* Circuit Court, and its seal hereto affixed at *Andersontown*, the 22d day of *July*, 1835.” On the second day of the term to which the writ was returnable, the defendant, as his first step in the case so far as the record shows, moved the Court to quash the writ on the single ground, that the clerk’s name was not subscribed at the conclusion of the teste. This motion was sustained.

There are two errors assigned. 1. That the [*138] defendant could *not after appearance, object to the writ. 2. That the writ was sufficient.

STEVENS, J., stated the points in the cause, and explained the nature of the original writ in *England* and the process founded upon it. He then proceeded as follows:

It may be observed that the common law doctrine as practiced in *England* respecting process, is in the general applicable to our writs unless altered by statute; and that, therefore, mere errors in our writs are cured by the appearance of the defendant. But there is a distinction between errors that only render the process voidable, and defects that render it void. Simple appearance does not cure the latter. Process in *England*, and our writs answering to those called process in *England*, form no part of the record; errors in them cannot be assigned for error: hence the only remedy is to move to set aside the proceedings; and that should be done before appearance, unless the writ is wholly void. In the latter case, a mere appearance will not cure the defect. The appearance, however, here spoken of, does not simply mean the coming of the defendant into the court-house; it means an appearance to the action, such as perfecting bail, or taking some step in the

Wibright v. Wise.

action towards a defense. The party must come before the Court, or he can make no objection to the writ, and this he cannot do until the writ is returned. The rule appears to be this: The motion must be made as early after the return of the writ, as is convenient and practicable according to the rules of the Court, and before any step is taken in the defense. The taking a copy of the declaration out of the office, has been decided to be such a step as will cure errors in process. 3 Bl. Comm. Chitt. Ed., 287, *n* 10; 1 Sell. Pr., 108. In this case, the party appears to have made his motion in due time; that is, there is nothing of record to show or even raise a presumption to the contrary.

The question then is, should the motion have prevailed? The appellant appears to rest his case upon the common law. The common law will not sustain him. At common law, his writ would have to be tested in the name of the President Judge, and then be sealed with the seal of the Court, and officially signed by the clerk. The clerk is the keeper of the seal of the Court at common law; and when he seals process, he must officially sign it to show that it was sealed at [*139] the proper *mint of justice. This writ at common law is erroneous. In the State of *New York*, the common law form exists as to the teste of writs. They are tested in the name of the Chief Justice; but the clerk must put the seal of the Court to them, and officially sign them; and it is error if he fail to sign his name. *Pepoon ats. Jenkins*, Col. & Caines' Cas., 60. Our statute, however, has altered the case. By the sixth section of the act organizing Circuit Courts, Rev. C., 1831, p. 140, it is enacted, that all writs issuing out of these Courts, shall bear teste in the name of the clerk of the proper Courts, &c. The clerk in issuing the writ now before us, appears to have substantially complied with that provision of the statute. The teste is in his hand-writing and is in these words: "Witness *Robert N. Williams*, clerk of the *Madison* Circuit Court," &c. This appears to us a sufficient signing and a sufficient teste. It is tested in due form as required by statute; and as that teste contains the

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name and official character of the clerk in his own handwriting, it appears to be sufficiently signed to show that it issued from the proper mint of justice; and that is all that can be required.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Kilgore, for the appellant.

W. Quarles, H. Brown and C. Fletcher, for the appellee.

[*140] *JONES v. JONES, in Error.

TROVER. Plea, not guilty; and verdict in favour of the plaintiff for thirty-three dollars. New trial granted on the plaintiff's motion. On the second trial, verdict and judgment in favour of the plaintiff for \$1,750. The defendant sued out a writ of error; and the only error assigned was, that the new trial ought not to have been granted.

The Court said that they must presume, as the contrary was not shown by the record, that there was a sufficient ground for the new trial.

Judgment affirmed, with three *per cent.* damages and costs.

[*141] THE BANK OF THE UNITED STATES and Another v. BURKE and Another.

FRAUDULENT CONVEYANCE—RIGHTS OF ADMINISTRATOR.—If a conveyance of real estate, executed by an intestate in his life-time to defraud his creditors, be set aside after his death by a court of chancery in a suit by the creditors, and the land be sold under the decree in order to pay the debts, neither the administrator of the estate nor the probate court has any control over the proceeds of the sale. (a)

(a) This case is said to be virtually overruled, so far as the doctrine therein stated is held applicable to the case of a deceased debtor, by the case of *Barton v. Bryant*, 2 Ind., 189, and *Id.*, 642; *Buller v. Jaffray*, 12 Ind., 504.

The Bank of the United States and Another v. Burke and Another.

SAME—RIGHTS OF CREDITOR.—The creditor whose bill is first filed to set aside such fraudulent conveyance executed previously to any judgment against the intestate, is entitled to a priority of payment over the other creditors.

ERROR to the *Dearborn* Probate Court.

STEVENS, J.—The facts of this case are not disputed, and are in substance as follows:

One *James Conn* in his life-time was seized in fee of a large and valuable tract of land in the county of *Dearborn*; and was at the same time much involved in debt. Being thus situated, he, on the 23d of *December*, 1820, for the purpose of securing the land from the grasp of his creditors, conveyed it in fee simple clear of all incumbrance, and with covenants of general warranty, to one *Thomas Dugan*; and put *Dugan* into full and peaceable possession of it, and of the rents, issues, and profits of the same. This full and peaceable possession, use, and occupancy of said land, said *Dugan* peaceably held and enjoyed under the conveyance of *Conn* during the life-time of *Conn*, and after his death until interrupted by the creditors of *Conn*.

Some four or five years after the making of said conveyance to said *Dugan*, he, the said *Conn*, died; and at the time of his death he was still indebted as follows: To the Bank of *Cincinnati*, for the use of one *Capp*, who transferred to said *Burke*, about the sum of \$2,169; to said *Vattier* about the sum of \$218; to the Bank of the *United States*, about the sum of \$8,528; and to one *Hutcheson*, about the sum of \$1,984. *Conn* died intestate, and shortly after his death, administration of his estate was granted by the said *Dearborn* Probate Court to *Daniel Bartholomew*. The estate was wholly insolvent. No assets came to the hands of the administrator to be administered; not even a sufficiency to pay the expenses of administration.

Burke and *Vattier* severally brought suit at law in [*142] the **Dearborn* Circuit Court, and recovered judgments to be satisfied out of assets *quando acciderint*. They then filed a bill in chancery in the said Circuit Court, praying

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to have said tract of land, so conveyed as aforesaid to said *Dugan* by *Conn*, subjected to the payment of their said judgments. Upon this bill such proceedings were legally had, that the Circuit Court decreed, that the deed of conveyance from *Conn* to *Dugan* was fraudulent and void as to creditors, and that the land should be sold for the payment of the debts of the intestate; and further decreed, that the said *Daniel Bartholomew*, as such administrator as aforesaid, should proceed to inventory, appraise and sell the same, for the payment of the debts of the intestate.

Bartholomew, the administrator, sold the land in pursuance of the decree, realizing in all about \$3,200. He charged himself with the money, as administrator, as assets of the estate in his hands to be administered; and reported his proceedings to the Probate Court. He made no report to the Circuit Court, from which he derived his authority to sell. He did not appear to view his acts as the acts of a commissioner appointed by the decree, but as the acts of an administrator, acting under the general statutory power of an administrator, in cases where the statute authorizes administrators to inventory, appraise, and sell the real estate of the intestate.

Neither the Bank of the *United States*, nor *Hutcheson*, had reduced their claims to judgments; but at this stage of the proceedings, they filed in the Probate Court evidence of their demands, and petitioned that Court to have the money raised by the sale aforesaid, distributed among all the creditors under the statute respecting the settlement of insolvent estates. To this *Burke* and *Vattier* objected, and the Probate Court decreed as follows, viz.: 1. That the funeral expenses, the expenses of the last sickness of the deceased, and the expenses of administration should first be all paid. 2. That the costs and expenses of the bill in chancery, and the sale and proceedings, should be next paid. 3. That the said judgments, costs, and interest, of the said *Burke* and *Vattier* should be next paid; and the remainder, if any, go to general distribution.

With this decree *Burke* and *Vattier* are content, but the

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Bank of the *United States* and *Hutcheson* have prosecuted this writ of error.

The first question is, whether the money arising [*143] from the *sale of this tract of land became assets in the hands of the administrator, to be by him administered under the statute regulating the settlement of insolvent estates? This estate is admitted to be insolvent, there being no personal estate out of which the debts of the intestate, or any part of them, could be paid. In such cases, the statute provides that the administrator shall inventory, appraise, and sell the real estate of the deceased, and that the proceeds of such sales shall constitute a fund for the payment of debts. The statute further directs that in such cases the funeral expenses, expenses of last sickness, and expenses of administration, shall all be first paid, and that the remainder of the fund shall be divided equally among the creditors, according to the amount of their several demands, without regard to their dignity. If, then, the money arising from the sale of this land, became assets of the estate of the intestate in the hands of the administrator, to be by him, as such administrator, administered under the provisions of the probate act, the decision of the Probate Court must be erroneous. *Burke* and *Vattier* should have only received their equal share with the other creditors, according to the amount of their several claims. This position, however, is certainly not tenable. *Conn* conveyed that land to *Dugan* in fee, by a good and sufficient deed of conveyance containing full covenants, &c.; and possession followed the conveyance, &c. This conveyance vested the whole estate and interest of *Conn* in *Dugan*, his heirs and assigns forever, as against *Conn* and his heirs. Neither *Conn* nor his heirs could ever interrupt *Dugan*, or those holding under him. The administrator stands in the shoes of his intestate. He has no interests or rights but those of the deceased. He cannot render available, or reduce to assets, that which his intestate could not claim, demand, and recover. This land formed no part of *Conn's* estate. It was gone from him and his heirs forever. It did not descend to his heirs, for

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he had no estate in it to descend; therefore it could not be reduced to assets in the hands of the administrator, and be subjected to distribution, under the probate act, as a part of *Conn's* estate.

Suppose this land had sold for more money than was required to pay all the creditors of *Conn*, to whom would the surplus fund go? It certainly could not go to *Conn's* [*144] heirs, because *the land was no part of his estate. It would go to *Dugan*, the legal owner. But if the money became assets in the hands of the administrator, to be by him as such administrator administered under the provisions of the probate act, it would be part of the estate of *Conn*, and the surplus would go to his heirs. This conveyance, however, being made without consideration, in fraud of *Conn's* creditors, *Dugan* is considered, in equity, as a trustee for the creditors; or, in other words, his title is incumbered with an equitable mortgage to the amount of the creditors' claims. He is not, however, a trustee for either *Conn* or his heirs. Hence, all remainders after creditors are satisfied belong to him. *Dugan* in this case was not bound to let the land be sold; he might have paid off the creditors, and held the land unincumbered.

From this view of the case it follows, that the moneys arising from the sale of this land, could not become assets in the hands of the administrator, and be subject to a distribution, under the provisions of the act respecting the settlement of insolvents's estates. *Bartholomew*, although he was the administrator of the estate of *Conn*, did not make that sale in that capacity, but in the capacity of a commissioner under the decree of the Circuit Court; and to that Court he should have reported his proceedings, and not to the Probate Court. The Probate Court had no jurisdiction or control of that fund, and therefore could make no decree respecting it. No part of that money was liable to pay the funeral expenses, or the expenses of the last sickness of *Conn*; nor was it liable to pay the expenses of administration upon his estate. 1 Fonb. Eq., 209; *Grider v. Graham*, 4 Bibb, 70; *Deatly's Heirs v. Mur-*

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phy, 3 Marsh., 472; *Bunn v. Winthrop*, 1 Johns. C. R., 329; *Lessee of Hartley v. M'Anulty*, 4 Yeates, 95; *Lessee of Church v. Church*, Ib., 280; *Reichart v. Castator*, 5 Binn., 109; Rob. on Fr. Con., 641 to 645; *Hawes v. Leader*, Cro. Jac., 270.

The next question is, can all the creditors of *Conn* come in under the decree of the Circuit Court, prove their claims, and be entitled to an equal distribution of the fund raised, according to the amount of their several claims;

We think that they cannot. The rule in equity appears to be well settled, that where the estate of the debtor has been voluntarily conveyed, before his creditors have obtained judgments against him, for the purpose of defrauding [*145] them, as in *this case, and it can not be seized and sold by an execution on the judgment at law, the creditor who first files his bill in equity to subject such estate to the payment of his judgment, obtains a priority and preference over the other creditors, although his judgment may be the junior; because, in such case, neither the judgment at law against the debtor, nor the writ of execution on the judgment, is any lien upon the estate so fraudulently conveyed away; and the only way in which the creditor can create any lien upon it, is by filing a bill in equity charging the fraud, and praying to have the estate subjected to the payment of debts, &c. Such a bill, the instant it is filed, becomes a specific lien; and the creditor who first files his bill, obtains a priority and preference over the other creditors, as a reward of his legal diligence. *Weed v. Pierce*, 9 Cow., 722; *Beck v. Burdett*, 1 Paige, 305; *Edmeston v. Lyde*, Ib., 637; *Corning v. White*, 2 Ib., 567; *Edgell v. Haywood* 3 Atk., 357.

The proceedings in the Probate Court are *coram non judice*, and must be reversed.

Per Curiam.—The judgment is reversed with costs. To be certified, &c.

G. H. Dunn, for the plaintiffs.

Caswell and Chester, for the defendants.

END OF NOVEMBER TERM, 1835.

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1836, IN THE TWENTIETH
YEAR OF THE STATE.

MEMORANDA.

In the last vacation, *Stephen C. Stevens*, Esquire, resigned his office as one of the Judges of this Court. He was succeeded by *Charles Dewey*, Esquire, who took his seat on the first day of the present term.

THE STATE *v.* ADAMS.

PERJURY IN UNITED STATES CASES—JURISDICTION.—If an affidavit be made under an act of Congress relative to the sale of public land, and the party in making it commit perjury, he may be punished under the act of Congress prohibiting the offense; but the Courts of this State have no jurisdiction of the case.

Note.—Judge *M'Kinney* was absent, in consequence of indisposition, during the whole of this term.

The State v. Adams.

ERROR to the *Allen* Circuit Court.

BLACKFORD, J.—This was an indictment for perjury. The charge is that the defendant willfully, corruptly, &c., made a false affidavit of his being an actual settler on a [*147] certain tract *of public land, and that by means of that affidavit he applied to enter the land under the act of congress of the 5th of *April*, 1832. The Circuit Court, on the defendant's motion, quashed the indictment for want of jurisdiction.

The only question for our consideration is, whether the Circuit Court had jurisdiction of the cause or not?

We have a statute saying that any person who shall willfully, corruptly and falsely make an affidavit, &c., shall be deemed guilty of perjury. Rev. Code, 1831, p. 186. And it is contended for the prosecution that the indictment before us is sustainable under that statute. But this doctrine can not be supported. The affidavit in question was made under an act of congress relative to the sale of public lands, and if the party, in making it, committed perjury, he must be punished under the act of congress prohibiting the offense. The State courts have no jurisdiction of the case. The prosecutor refers us to the case of *Chess v. The State*, in this Court, *May* term, 1822. In that case it was decided that a person guilty of counterfeiting the current coin of the *United States*, may be indicted and punished under the State law prohibiting the crime. There is a good reason for that decision. The act of congress of 1789, usually called the judiciary act, gives exclusive jurisdiction to the Federal Courts of all offenses under the authority of the *United States*, unless where the laws of the *United States* shall otherwise provide. Gordon's Digest, 97. But the act of congress which prohibits counterfeiting the coin, expressly provides that nothing in that act shall deprive any State court of jurisdiction over the offense, under the laws of the State. Gordon's Dig., 711. That proviso enabled us to say that the Circuit Court of the State had jurisdiction in that case. *Houston v. Moore*, 5 Wheaton, 1. So, in the acts of congress of 1807 and 1816, concerning the forgery of the notes of the

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Bank of the *United States*, there are provisos similar to the one we have mentioned in the act against counterfeiting the coin. Without such a proviso, the State courts, since the judiciary act above referred to, can have no jurisdiction of offenses cognizable under the authority of the *United States*. *Houston v. Moore*, 5 Wheaton, 1; 1 Kent's Comm., 398; 3 Story's Comm., 623.

There is an act of congress prohibiting perjury committed in cases like the one now before us. Gordon's Digest, 715. But there is no provision in that act, nor in any other act [*148] of congress known to us, which saves to the States the right of punishing perjury in such a case. It follows, of course, that the State courts have no jurisdiction of the offense.

In the case of a false affidavit made under the revenue laws of the *United States*, it seems clear that in the absence of any special provision to the contrary, an indictment for the perjury must be found in the Federal Courts, and the punishment be according to the act of congress on the subject. And there is no reason why the law should not be the same in the case of a false affidavit, made under the laws of congress, respecting the sale of the public lands.

The indictment, in the present case, was correctly quashed by the Circuit Court for the want of jurisdiction.

Per Curiam.—The judgment is affirmed. To be certified, &c.

W. Herod and *S. C. Sample*, for the State.

M. M. Ray, for the defendant.

HUTCHEN and Another v. NIBLO.

INSOLVENT DEBTOR—RELIEF FROM IMPRISONMENT.—An insolvent debtor, imprisoned on an execution issued by a justice of the peace, must make his application for relief from imprisonment to two justices of the peace.

CONSTRUCTION OF STATUTE.—A statute should be so construed that every part of it, if possible, may be operative (a).

ERROR to the *Franklin* Circuit Court.

DEWEY, J.—*Niblo* instituted an action against *Hutchen* and *Berry* on an obligation, the condition of which, after reciting a judgment rendered by a justice of the peace, and an execution upon it issued by him, on which *Hutchen* had been imprisoned in the jail of *Franklin* county, stipulated “that he should, from and after the execution of said obligation, continue a true prisoner in the custody of the jailor, or keeper of the prison of the county aforesaid, and within the limits of the jail bounds, without attempting any manner of escape until discharged by law.” The breach assigned is, “that *Hutchen* did not, from and after the execution of the said obligation, continue a true prisoner in the custody of the jailor, or keeper of the [*149] prison of *the county aforesaid, and within the limits of said prison bounds, without attempting any manner of escape until discharged by law, but, on the contrary, broke said prison bounds, and made his escape therefrom, without being lawfully discharged.”

Under an agreement by the parties to let in special matter in defense without pleading, the plaintiffs in error offered to prove that *Hutchen*, as an insolvent debtor, filed his petition, schedule, affidavit, and bond with surety, in the office of the clerk of the *Franklin* Circuit Court; that he procured the supersedeas of the clerk, and was by virtue of it discharged from imprisonment. *Niblo* objected to the admission of this testimony. The Circuit Court sustained the objection and rendered judgment in his favor.

The only question presented for the consideration of this Court is: Was the rejection of the evidence offered to be given, error?

The statute for the relief of insolvent debtors, approved February 9th, 1831, prescribes in the first section the mode of obtaining relief by application to the Circuit Court in term

(a) See *Palmer v. Stumph*, 29 Ind., 329, and cases there cited.

time, whether civil process shall have issued against the insolvent or not. The tenth section provides a remedy for an insolvent person, who shall have been arrested in vacation by virtue of any civil process. He is to make his application at the clerk's office. It was under this section that *Hutchen* filed the petition, schedule, affidavit and bond, and procured the supersedeas and discharge which he offered in evidence, and which were rejected by the court on the trial below. The fourteenth section enacts, "that if any person shall be taken and charged in execution issued on any judgment obtained before any justice of the peace, it shall be lawful for any two justices of the peace of the county" to grant the relief sought; and prescribes the mode of proceeding, which is essentially different from that directed by the first and tenth sections (1).

It is contended by the plaintiffs in error that *Hutchen*, being an insolvent debtor, in prison upon an execution issued by a justice of the peace, had a right to make his application for relief from imprisonment, either to the clerk of the Circuit Court under the tenth, or to two justices of the peace under the fourteenth section of the statute. We think the position is not tenable.

[*150] *It is true, that the phraseology of the tenth section may be so construed as to include all insolvent persons detained upon civil process, from whatever authority emanating, without violating its letter; though its terms are more naturally appropriate to the process of the higher courts. It can not, however, receive such a construction without infringing that well known rule of law—that statutes shall be so construed as to render every part of them operative, if possible. If the legislature designed that an insolvent person, imprisoned upon an execution issuing from a justice of the peace, should have the same right to seek redress from the Circuit Court in term, or from the clerk in vacation, that an insolvent debtor amenable to or imprisoned by the process of that court has, the fourteenth section of the act is wholly unnecessary, and serves no other purpose than that of creating a senseless multiplicity of remedies for insolvents imprisoned by justices of the peace, while all

 Warren v. The State.

others have but one mode of relief. This view of the subject, taken in connection with the consideration that different manners of notifying creditors of the insolvent's application for relief, and different forms of oaths, are by the statute prescribed to the two classes of insolvent debtors, is, we think, conclusive that the Circuit Court was correct in rejecting the evidence offered to be given by the plaintiffs in error.

Per Curiam.—The judgment is affirmed with two *per cent.* damages and costs.

G. Holland, for the plaintiffs.

J. Ryman, for the defendant.

(1) Rev. C., 1831, p. 199; Acc. Rev. Stat., 1338, p. 227 to 233.

 WARREN v. THE STATE.

RIGHT OF JURY.—In an indictment for larceny, the jury have a right to determine the law as well as the facts of the case (a).

ERROR to the *Green* Circuit Court.

BLACKFORD, J.—Indictment for larceny. Plea, not guilty. Verdict and judgment for the State.

After the evidence on both sides was closed, the defendant below asked the Court to instruct the jury that they [*151] were the *judges of the law as well as of the facts in the cause, which instruction the Court refused to give.

We think that the Court ought to have given the instruction required, and that their refusal to do so renders the judgment erroneous.

Per Curiam.—The judgment is reversed and the verdict set aside. Cause remanded, &c.

J. Writcomb for the plaintiff.

W. Herod, for the State.

(a) *Williams v. The State*, 10 Ind , 503.

Tardy v. The State, in Error.

WALPOLE v. SMITH, in Error.

HELD, in this case, that the death of the plaintiff in error, *after the errors are assigned*, does not abate the writ of error. 2 Tidd's Prac., 1128.

[*152] *TARDY v. THE STATE, in Error.

THIS was an indictment for perjury against *John G. Tardy*, and the affidavit on which the perjury was assigned is alleged in the indictment to be signed by him. *Held*, that an affidavit signed *John Gabriel Tardy* was not, in consequence of the variance, admissible as evidence in support of the indictment.

END OF MAY TERM, 1836.

[*153]

*CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1836, IN THE TWENTY
FIRST YEAR OF THE STATE.

CAMMACK *v.* RUPERT and Another.

BOND—DISCHARGE OF—To an action on a bond, a plea stating merely that the parties had agreed, by a writing obligatory, that the bond should be discharged on certain conditions, is insufficient.

ERROR to the *Vigo* Circuit Court.

DEWEY, J.—*Rupert et al.* declared in action of debt against *Cammack* on a single bond for the payment of a sum of money.

Cammack pleaded in bar, that by a certain writing obligatory made between himself of the first part, a certain *Robert Kyle* of the second part, and *Rupert et al.* and other creditors of *Cammack*, of the third part, it was agreed by *Rupert et al.* and the other creditors of *Cammack*, that, in consideration of the assignment by *Cammack* of all his right and interest in and to

Note.—Judge *M'Kinney* was absent, in consequence of indisposition, during the first week of the present term.

Cammack v. Rupert and Another.

a certain policy of insurance executed to *Cammack* by [*154] the *Protection Insurance Company of *Hartford, Connecticut*, on which policy a suit was then pending in the *Jefferson Circuit Court, Kentucky*, they would receive of said *Kyle* fifty cents in the dollar on the respective sums due them, provided an amount sufficient for that purpose should be recovered in the suit upon the policy; that it was also agreed between the three parties aforesaid, that if the suit should produce more than would pay to the creditors fifty cents in the dollar on their debts, that the overplus should go to said *Cammack*; and that it was further agreed, that if nothing should be recovered on the policy, so soon as that event should be known, *Cammack* should have it in his power to discharge himself from the debts enumerated in said writing obligatory, "by giving to the creditors therein named satisfactory security for the payment of fifty cents on each dollar due them." And the plea concludes with an averment that the debt on which the suit was founded, was one of those contained in the aforesaid writing obligatory.

To this plea there was a general demurrer. The Circuit Court sustained the demurrer, and rendered a judgment in favour of *Rupert et al.* for their debt and damages.

This judgment is correct. The plea does not profess to allege accord and satisfaction, or a release. It contains no averment of the result of the suit in the *Jefferson Circuit Court*—whether it be pending or whether it be decided. We know not whether anything was recovered by *Kyle* in that suit; or whether if he failed to recover any thing, *Cammack* has given or attempted to give security to *Rupert et al.* for the payment of fifty cents on the dollar of their debt. Without determining whether the averments of these facts would make the plea good, there can be no doubt that without them it is bad.

Per Curiam.—The judgment is affirmed with five *per cent.* damages and costs.

J. D. Taylor, for the plaintiff.

E. M. Huntington, for the defendants.

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*GIBBONS v. SURBER.

JOINT DEFENDANTS—JUDGMENT.—In a joint action against two, on a joint, or on a joint and several contract, the plaintiff can not take judgment against one alone, unless the process be returned *non est inventus* as to the other (a).

ERROR to the *Hendricks* Circuit Court.

DEWEY, J.—This was an action of debt by the assignee of a joint and several bond for the payment of a sum of money, in which he declared jointly against all the obligors, *Smith* and *Gibbons*. The record contains no notice of *Smith* whatever, after the filing of the declaration. *Gibbons* appeared and put in a special plea in bar, upon which issue was joined; which being found for the plaintiff below, a separate judgment was rendered against *Gibbons* for the debt demanded and damages.

The error assigned is the rendition of this judgment against one obligor, without any disposition of the suit having been made as to his co-obligor, sued jointly with him.

The law is well settled in *England*, that in a joint action against several on contract, a valid judgment can not be rendered against a part of the defendants, on whom process may have been served, without having first proceeded to outlawry against the residue of them. 1 *Strange*, 473; 2 *Id.*, 1269; 15 *East*, 1; 1 *Maule & Selw.*, 242. The same doctrine has been recognized and established by our own and other *American* decisions, substituting in the place of the *English* process of outlawry, statutory provisions designed to effect the same object. 1 *Blackf.*, 106; *Ib.* 139; 7 *Cranch*, 194.

It is true that, in this case, the contract on which the suit in the Court below was founded is *joint* and *several*. But the defendant in error can not avoid the force of the authorities above quoted, in consideration of that circumstance. The only difference between a contract merely *joint*, and one joint

(a) The law, as laid down in this case, is materially modified by the provisions of the code. See *Maiden v. Webster*, 30 *Ind.*, 317.

The State v. Odell.

and several, *as* respects the right of the holder of the one or the other in pursuing his remedy, is, that on the first he is obliged to sue all the living promisers, whereas on the latter he has a right to elect between one and all of them. Having made his election, the contract becomes, so far as the rules of law applicable to his remedy are concerned, purely several or purely joint; and he is no longer at liberty to consider it other *than what he has made it by his own determination. The contract has then entirely lost its mixed character, and a suit upon it must be governed by the same principles which would have controlled it had it been originally what choice ultimately made it. 1 Chitt. Pl., 32; 1 Saunder's Rep. 291, n. 4; 1 Blackf., 140. In this case, therefore, as the action below was joint, the contract which was the foundation of it must be viewed as also joint.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the issue set aside, with costs. Cause remanded, &c.

C. C. Nave and *W. Quarles*, for the plaintiff.

J. B. Ray, for the defendant.

THE STATE v. ODELL.

FELONY—FORMER ACQUITTAL BY A JUSTICE.—A judgment of acquittal by a justice of the peace, on a charge of an assault and battery with intent to murder, is *coram non judice* and void.

SAME.—A plea of such acquittal to an indictment for an assault and battery alleged to be the same offense with that determined by the justice, can not be sustained.

ERROR to the *Montgomery* Circuit Court.

BLACKFORD, J.—Indictment against *Caleb Odell* for an assault and battery on *Allen Moore*. Plea, that the defendant had been tried by a justice of the peace for an assault and battery on *Allen Moore* with intent to murder him, and had been acquitted by the justice of the charge; and that the assault

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and battery mentioned in the indictment is the same with that determined by the justice. Demurrer to the plea, and judgment for the defendant.

This judgment must be reversed. The justice had no jurisdiction to try and determine an assault and battery with an intent to murder, and the proceedings before him, described in the plea, were *coram non judice*. The justice should have taken measures to secure the defendant's appearance at the next term of the Circuit Court to answer the charge; and that was all he was authorized to do with him. The judgment of the justice, on the merits of the charge of an assault and battery with intent to murder, is a nullity; and the [*157] defendant's *plea to the indictment, relying on that judgment, is no defense.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. Herod, for the State.

I. Naylor, for the defendant.

NIXON v. BROWN.

PROOF OF MARRIAGE.—In an action for crim. con., it was held that the solemnization of the plaintiff's marriage might be proved by a witness who was present at the ceremony.

SAME.—Whether, if the marriage was solemnized in another State by a justice of the peace, it should be proved that, by the laws of such State, a justice was authorized to perform the ceremony: *quære*.

FAILURE OF PROOF—PRACTICE.—That the plaintiff has failed to prove a material point in his case, is an objection not to be made until the examination of his testimony is closed. If it then appear, that any proof indispensable to the maintenance of the suit has not been produced, the Court may instruct the jury that the plaintiff cannot recover.

READING FROM LAW-BOOKS.—If a passage in a law-book of another country be not law in this State, it ought not to be read to the jury.

APPEAL from the *Wayne* Circuit Court.

BLACKFORD, J.—This was an action of trespass brought by *Brown* against *Nixon*, for criminal conversation with the

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plaintiff's wife. Plea, not guilty. Verdict and judgment for the plaintiff below.

It appears by a bill of exceptions, that the plaintiff below offered to prove his marriage by a witness who was present at the ceremony, which was performed by a justice of the peace in *Guilford* county, *North Carolina*, and to prove also, by the same witness, that the justice was in the habit of solemnizing marriages in that county, but without offering to prove that, by the laws of *North Carolina*, a justice was authorized to solemnize marriages. The witness was objected to, but the objection was overruled. The bill of exceptions then states, that this being all the evidence offered in regard to the marriage, the defendant objected to it as insufficient, but the Court overruled the objection.

[*158] *The objection made to this testimony was correctly overruled. Admitting that the fact of marriage could not be established, without proof of the law of *North Carolina* on the subject, still the witness introduced was admissible, and his testimony could not be overruled. The plaintiff was not obliged, at that particular moment, to show that the ceremony which he was proving, was authorized by the laws of *North Carolina*. He had a right to do that at any time previously to closing the examination of his testimony. A party cannot be required to produce, at the same time, all his evidence in support of any one part of his action or defense. The testimony objected to, if not sufficient of itself to prove a legal marriage, conduced to prove such a marriage, and was consequently admissible. The defendant could not, at that stage of the cause, say that the evidence introduced was insufficient. The question of its sufficiency could not then be inquired into. The *admissibility* of the evidence, not its *sufficiency*, was all the Court had before it to decide; and that point was correctly decided. *Roscoe on Evidence*, 62.

It may be, that after this bill of exceptions was signed, the laws of *North Carolina* authorizing the ceremony in question, were proved to the satisfaction of the Court and jury; and, if such proof was necessary to sustain the verdict, we are bound

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to presume that it was produced; the record not showing the contrary.

That the plaintiff had failed to prove a material point in his case, was an objection not to be made until he had closed the examination of his testimony. If at that time, no evidence of the law referred to had been given, and its proof was indispensable to the maintenance of the suit, the defendant might then have required the Court to instruct the jury, that the plaintiff could not recover.

The case, as it stands, does not present the question, whether the law of *North Carolina* should have been proved or not. The only question relative to the plaintiff's marriage, decided by the Circuit Court, and which we are now called on to decide, is, whether the plaintiff below was bound to prove the law at the time the defendant required its production? That question is answered in the negative.

The proceedings are also objected to, because the Circuit Court refused to permit the defendant to read to the [*159] jury some *passages from certain law books written in *England*. Without looking into this subject any further, it is sufficient to observe that the record does not show what the passages proposed to be read were, and we must presume in favor of the judgment that they were not law in this State, and of course should not be read.

There is one other point mentioned in the record, but it is not insisted on by the appellant and is clearly untenable.

Per Curiam.—The judgment is affirmed with one *per cent.* damages and costs. To be certified, &c.

M. M. Ray and *J. Perry*, for the appellant.

J. Rariden and *J. S. Newman*, for the appellee.

Gherkey v. Haines.

GHERKEY v. HAINES.

AD QUOD DAMNUM—DAM—FINDING OF JURY.—The inquest, in the case of a writ of *ad quod damnum*, must distinctly state whether, in the opinion of the jury, the health of the neighborhood will be annoyed by the stagnation of the water which the contemplated dam may occasion (a).

ERROR to the *Delaware* Circuit Court.

DEWEY, J.—This was an application by the defendant in error to the *Delaware* Circuit Court, for a writ of *ad quod damnum*.

The petition states that the applicant was the owner of a tract of land (describing it) on the margin of *White* river, in said county; that he was desirous of erecting a dam across said river on said land for the purpose of building a water saw-mill, and that the land on the opposite side of the river, where he proposed to abut his dam, was owned by the plaintiff in error. He therefore prayed for the writ of *ad quod damnum*, "agreeably to the statute in such case made and provided."

The plaintiff in error appeared in the court below and put in four special pleas to the petition. Two of them were demurred to, and there was a joinder in the demurrer. The other two were answered by replications, to which [160] there was a demurrer, and joinder therein. The first demurrer was sustained and the second overruled by the Circuit Court; whereupon, a writ of *ad quod damnum* was awarded. The sheriff returned into court the inquest of the jury, which had been summoned upon the writ. The inquest, after reciting preliminary proceedings, and the appraising and setting off, by metes and bounds, one acre of land belonging to the plaintiff in error for the abutment of the proposed dam, proceeds to state, that "after examining all the lands above and below the said proposed dam, we, the jury, do find that there will no damage accrue to any of them, or the owners of the same, by reason of the stagnation or overflowing of the water;

(a) See 2 R. S. (G. & H.), p. 310.

and further, that neither ordinary navigation nor fish of passage will be obstructed by the said dam." The Circuit Court granted the prayer of the petitioner, and gave judgment in his favor.

It is unnecessary to examine any point arising from the pleadings in the court below, as the whole was irregular and unauthorized by the statute regulating writs of *ad quod damnum*, and must be considered as surplusage in the record. The course prescribed by that statute is, that the Circuit Court shall order the writ to issue upon a proper application for it; the sheriff to whom the writ may be directed shall summon a jury; they having discharged their duty the sheriff shall, at the next succeeding term, return their inquest into court. After this shall have been done, steps shall be taken to call all parties interested in the proceedings into court, that they may urge their various rights. Rev. Code, 1831, p. 65 (1).

Among the many errors assigned for the purpose of reversing the judgment of the Circuit Court, it will be necessary to attend only to that which objects to the sufficiency of the inquest. By the statute referred to, it is made the imperative duty of the jury of examination, among other things, to say in their inquest whether, in their opinion, "the health of the neighbors will be annoyed by the stagnation of the waters," which may be occasioned by the contemplated dam. This, in our opinion, has not been done in the present case. The inquest does, indeed, state that no damage will be done to the lands above or below the place designed for the dam, nor "to the owners of the same by reason of the stagnation or overflowing of the water." No rational construction can [*161] make this *language mean, that the health of the neighborhood which may exist around the water obstructed by the dam, will not be endangered by its stagnation.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the petition set aside, with costs. Cause remanded, &c,

M. M. Ray and J. B. Ray, for the plaintiff.

C. B. Smith, for the defendant.

Thomas v. Winters.

THOMAS v. WINTERS.

JUSTICE OF THE PEACE—PRACTICE.—The defendant in a justice's court may show, under the general issue, that the process had not issued in the proper township (a).

ERROR to the *Vigo* Circuit Court.

DEWEY, J.—*Thomas* sued *Winters* before a justice of the peace on a book account, and recovered judgment against him by default. *Winters* appealed to the Circuit Court.

In that Court, on the trial of the cause, *Thomas* proved by the admission of *Winters* that the account was correct and justly due to him. *Winters* proved, that the summons issued by the justice was served upon him out of the township in which it was issued; that he, *Winters*, resided in the township where it was served, and where the debt was contracted; and that there was an acting and competent justice of the peace in that township at the time. To the admission of this proof *Thomas* objected; but the Circuit Court heard and considered it, and dismissed the cause for want of jurisdiction. There was no plea put in by *Winters*; but he was entitled to the benefit of the general issue without pleading it. Rev. Code, 1831, p. 301 (1).

The only question presented by this record is, was the above evidence on the part of the defendant legally admitted under the general issue? There can be no doubt, that had the facts disclosed in evidence been pleaded before the justice and proved, they would have divested him of jurisdiction [*162] of the *cause. Rev. Code, 1831, p. 299. If legally admitted in evidence by the Circuit Court, under the general issue, they produced the proper result.

It is generally true, that in suits in Courts of *general* jurisdiction, if an objection to the jurisdiction exist, which does not appear upon the record, it can only be adduced in the

(a) See *Willey v. Strickland*, 8 Ind., 453; *Brickley v. Heilbruner*, 7 Id., 488; *Poyser v. Murray*, 6 Id., 35.

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form of a dilatory plea, and is lost to the party wishing to use it, if he plead to the merits. But this rule, even in such Courts, is not without exceptions. If the action be local, or the remedy be confined to another Court by an act of legislation, the plaintiff will be *non surt* by a disclosure of the facts showing want of jurisdiction under the general issue. Bac. Abr. Pleas, E., 1; *Taylor v. Blair*, 3 Term Rep., 453; *Doulson v. Matthews*, 4 Term Rep., 503; *Parker v. Elding*, 1 East., 352; 1 Saund. Plead., 1; *Rex v. Johnson*, 6 East, 583.

In *inferior* Courts the rule is different. In them, want of jurisdiction can be taken advantage of without pleading it. It may be disclosed in evidence under the general issue; and when disclosed will be fatal to the claim of a plaintiff. Bac. Abr. Pleas, E, 1: 1 Chitt. Pl., 425, *n. b.* Ib., 428; Bac. Abr. Courts, D., 4; 1 Saund. Pl., 1.

By our statute, no person is "bound to answer any summons, capias, or other process issued by a justice, in civil cases, in any other township than the one in which he actually resides, or where the debt was contracted, or the cause of action accrued, or where the defendant may be found, unless there shall be no justice who can legally issue such summons, capias, or other process." The evidence contained in the record shows that the defendant, *Winters*, did not live in the township where the process issued, that the debt was not contracted, nor he found there; and it shows that there was an acting and competent justice of the peace in the township in which he did live, and in which the process was served. The justice who tried the cause, therefore, clearly had no jurisdiction over it; and as he possessed an inferior and limited jurisdiction only, the Circuit Court acted correctly in hearing the evidence and dismissing the action.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

E. M. Huntington, for the plaintiff.

S. B. Gookins, for the defendant.

(1) Accord. Rev. Stat., 1838, p. 368.

Claypool v. Miller.

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*CLAYPOOL v. MILLER.

EVIDENCE—ADMISSIONS.—If the defendant, on being examined as a witness before arbitrators in a suit referred by a justice, state that he has no knowledge respecting a particular item in the account sued for, he does not thereby admit the correctness of that part of the account.

ARBITRATOR—A WITNESS.—Whether an arbitrator is a competent witness in support of a motion to set aside an award: *quære*.

PRACTICE.—Awards before justices of the peace may be set aside by the Circuit Court for mistakes of the arbitrators in matters of law, and such mistakes may be proved, under the statute, by extrinsic evidence.

ERROR to the *Fayette* Circuit Court.

BLACKFORD, J.—*Miller* sued *Claypool* in an action of assumpsit before a justice of the peace. The cause of action was a physician's account for medicine and attendance. The defendant denied, by plea, the greater part of the account. The cause was referred to arbitration; the arbitrators rendered an award in favour of the plaintiff, and the justice entered a judgment upon the award. The defendant appealed to the Circuit Court. A motion to set aside the award was made in the Circuit Court by the defendant, but the motion was overruled, and a judgment rendered for the plaintiff.

It appears that the defendant, being examined as a witness before the arbitrators, had there stated that he had no knowledge respecting most of the charges in the plaintiff's account, and that he could not, therefore, either admit or deny them. It further appears that the arbitrators considered this answer of the defendant as an admission, at law, that those charges were correct. It was for this mistake of the arbitrators respecting the law that the motion to set aside the award was made in the Circuit Court.

The motion ought to have prevailed. *Claypool* was in the same situation with the other witnesses for the plaintiff. He

could only answer to the best of his knowledge. That
[*164] part of *the plaintiff's account which the defendant
said he knew nothing about could not be recovered
without the introduction of other testimony.

Hackleman and Others v. Moat.

The record shows that one of the arbitrators was sworn as a witness for the defendant, to support the motion to set aside the award. No objection was made to this witness in the Circuit Court, and the question respecting his competency is not therefore before us (1).

The defendant in error contends that the objection made to the award in this case ought not to be sustained, because the objection does not appear on the face of the award. He relies, for this position, on the *English* law. That law, it is believed, is as the defendant in error states it, but the law with us must be considered otherwise. Our statute expressly says that awards before justices of the peace may be set aside for mistakes of the arbitrators in matters of law (2). This provision would be almost a dead letter if such mistakes could not be shown by extrinsic evidence, because awards very rarely show the grounds upon which they are founded. The party's right to the benefit of this statutory provision ought not to depend upon the form in which the arbitrators choose to draw the award.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

C. B. Smith and *O. H. Smith*, for the plaintiff.

J. Perry, for the defendant.

(1) *Vide Ellis v. Saltau*, cited in a note to *Johnson v. Durant*, 4 Carr. & P., 327; *Martin v. Thornton*, 4 Esp. R., 180; *Woodbury v. Northy*, 3 Greenl. R., 85.

(2) Accord. Rev. Stat., 1838, p. 371.

HACKLEMAN and Others v. MOAT.

POSSESSION—EVIDENCE.—The possession of a bond by a third person is a strong circumstance to prove that he is authorized by the obligee to collect the money.

ACKNOWLEDGMENTS OF PRINCIPAL AS TO SURETY.—In a suit on a bond against the principal and his sureties, the acknowledgments of the principal may be proved to show his own liability; but *quære*, whether they can be considered as evidence to affect the other defendants (a)?

(a) See cases cited in *Boone County Bank v. Wallace*, 18 Ind., 82; 5 Blackf., 61

Hackleman and Others v. Moat.

WRITTEN EVIDENCE MUST BE PRODUCED.—If the contents of letters be the subject of inquiry, the letters themselves must be produced, or their absence accounted for.

[*165] *INTEREST AFTER DEMAND.—An agent is liable, by the statute, for interest on money received by him for his principal, from the time of its being demanded.

PRACTICE.—The Court ought not to express to the jury any opinion respecting the sufficiency of the evidence (*b*).

ERROR to the *Fayette* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by *Moat* against *Hackleman* and others, founded on a writing obligatory conditioned for the performance of an agency by *Hackleman* for *Moat*, in selling certain medicines and books. The declaration sets out the condition of the bond and assigns breaches. The defendants pleaded three pleas. First, *nil debet*; secondly, that *Hackleman* never received the medicines and books; thirdly, that *Hackleman* was never requested to account. Issues were joined upon these pleas, and a verdict and judgment were rendered for the plaintiff below.

It appeared, on the trial, that a man by the name of *Pelham*, as *Moat's* agent, called on *Hackleman* for a settlement of his business with *Moat*, and that a settlement was accordingly made. In order to show *Pelham's* authority to act in the business, proof was offered that he had, at the time of the settlement, *Hackleman's* bond in his possession. The defendants objected to this evidence on the ground that *Pelham's* authority could only be proved by written evidence. This objection was correctly overruled. A written authority was not necessary. *Pelham's* possession of the bond was a strong circumstance to show that he had authority from the obligee to require the obligor to account. 13 Petersd., 730. It might not be sufficient evidence to satisfy the jury of the fact of *Pelham's* agency, but it was legal evidence as far as it went. *Owen, qui tam v. Barrow*, 1 New Rep., 101.

A witness was offered to prove that *Pelham*, as *Moat's* agent, a considerable time after the alleged receipt of the medicines and books by *Hackleman*, called on *Hackleman* for a settle-

(b) *Reynolds v. Cox*, 11 Ind., 262; 3 Ind., 334; 7 Id., 454.

Hackleman and Others v. Moat.

ment, and that *Hackleman* then agreed that he had received from *Moat* medicines and books to the amount of \$1,348. The defendants objected to this evidence, but the objection was overruled.

This evidence of *Hackleman's* acknowledgment of his previous receipt of the medicines and books would not have been objectionable, had the suit been against him alone. But it is said, that as the suit is against his sureties as well as [*166] himself, *the evidence, if admitted, must charge the sureties as well as their principal. If this consequence followed from the admission of the evidence objected to, the objection might be tenable. But we can see no good reason why *Hackleman's* acknowledgments may not be proved, in order to show his own liability. Perhaps the plaintiff, besides the principal's acknowledgments, could prove acknowledgments to the same effect, made at a different time by the sureties. If so, the jury would have the acknowledgments of all the defendants as to the same fact, and they might then, with propriety, consider the part of the case to which the acknowledgments related, to be sufficiently established. To enable the plaintiff to avail himself of such proof against all the defendants, he must have the opportunity, if he wishes it, to begin by proving the acknowledgment of any one of them.

The attorney who, at *Pelham's* request, brought this suit, was a witness. He states that since *Pelham's* departure, he has received letters purporting to be from *Moat*, giving him directions as to the suit; that he does not know *Moat's* hand-writing, but has no doubt the letters are from him. These letters, he says, were mailed in *New York*; near which city, as the bond shows, *Moat* resides. This evidence was objected to, and should not have been received. The object of it was to show that *Moat*, by thus writing to the attorney employed by *Pelham*, had recognized *Pelham* as his agent in the business. The contents of the letters were the subject of inquiry, and the letters themselves ought, therefore, to have been produced, or the cause of their absence shown. Besides, there was no proof that the letters were written by *Moat*.

The Court charged the jury that they might give the plaintiff interest on the amount due to him, from the time the proceeds of the sale were demanded. There is no objection to this charge. If the plaintiff could sustain his action, he was entitled to interest on the sum due from the time of demand. Rev. Code, 1831, p. 290 (1).

The Court further instructed the jury that "if they believed the evidence to be true, it was sufficient to prove the agency of *Pelham* to charge all the defendants." This instruction ought not to have been given. The evidence that *Pelham*, calling himself *Moat's* agent, demanded an account of *Hackleman*, and that he had with him the bond given [*167] to *Moat* by **Hackleman* and his sureties, was legal evidence for the jury, because it tended to show the authority of *Pelham*. But whether the evidence given of the authority, was sufficient or not to satisfy the jury of the fact, was entirely a different question. When legal evidence is before a jury tending to prove a particular fact, it is for the jury alone to say whether that evidence is strong enough or not for the purposes intended. The court ought not to express to the jury any opinion respecting the sufficiency of the evidence. *Greenleaf v. Birth*, 9 Peters, 292. The Court has an opportunity to give an opinion as to the weight of the evidence, when a new trial is moved for on the ground that the verdict is not sustained by the testimony.

Had the Court been asked to inform the jury, that a power of attorney was not indispensable to the proof of *Pelham's* agency, the instruction should have been given; because that instruction would have been only as to a question of law. But the question, whether the unwritten evidence before the jury of *Pelham's* agency, was sufficient or not to establish its existence, was not a question of law but purely of fact, and was a question with which the Court could not legally interfere (2).

Per Curiam.—The judgment is reversed and the verdict set aside with costs. Cause remanded, &c.

O. H. Smith and *C. B. Smith*, for the plaintiffs.

J. Raviden and *J. S. Newman*, for the defendant.

Young v. Harry.

(1) If an attorney or agent for selling land, collecting money, &c., keep the money received safely, be not in default, and be ready *on demand* to pay the same to his principal, he is not chargeable with interest for the money, unless he has used it for his own profit. *Williams v. Storrs*, 6 Johns. Ch. R., 353.,

(2) There was another point decided in this case, but as it has been since overruled, it is not here noticed.

YOUNG v. HARRY.

SET-OFF—PLEA OF.—A plea of matters of set-off must be, under the statute, in the form of a plea of payment, setting out, in the conclusion, the matters of set-off

APPEAL from the *Marion* Circuit Court.

DEWEY, J.—This was an action of debt by the assignee of a promissory note against the maker. The defendant below pleaded in bar, that before he had notice of the [*168] assignment *of the note, and at the time of pleading, the assignor was indebted to him in the sum of \$500 (an amount greater than that of the note), for goods, wares, and merchandise sold and delivered, and for various other matters set forth in the plea; which sum so due and owing from the assignor to the defendant, he had been and was then ready and willing to set off against the claim of the plaintiff below. To this plea the plaintiff demurred, assigning for cause of demurrer, that the plea is “anomalous, unusual, and unknown to the law of the land.” Joinder in demurrer, and judgment for the plaintiff.

The question presented by this record has long since ceased to be debatable. This court has repeatedly decided that under our practice act, a plea in nature of set-off must, in form, be a plea of payment, concluding with the special matter of set-off. The plea in question lacks the necessary form, and is bad. 1 Blackf. Rep., 188; *Ib.*, 367.

M'Cormick v. Maxwell.

Per Curiam.—The judgment is affirmed with five *per cent.* damages and costs. To be certified, &c.

H. Brown and J. L. Ketcham, for the appellant.

J. Morrison, for the appellee.

M'CORMICK v. MAXWELL.

PRACTICE—WAIVER.—A plea to the jurisdiction of a justice in assumpsit was not sworn to; but the plaintiff went to trial on it before the justice and on appeal in the Circuit Court, without mentioning the defect. *Held*, that the objection was waived.

JUSTICE OF THE PEACE—JURISDICTION.—The process in such case need not be answered, if not issued in the township where the defendant lives, or where the cause of action accrued, or where the process was served, unless there be no competent justice in such township.

SAME—PROOF.—The want of jurisdiction, in such case, may be proved under the general issue (a).

ERROR to the *Fountain* Circuit Court.

DEWEY, J.—This was an action of assumpsit commenced before a justice of the peace. The defendant in the original suit, *M'Cormick*, pleaded to the jurisdiction of the justice without verifying his plea by oath. No objection, however, was made to the plea on that account. The justice rendered judgment against him, and he appealed to the [*169] Circuit Court. *The parties appeared there, and the defendant, on the calling of the cause for trial, proceeded to prove the facts divesting the justice of jurisdiction, without any exception being taken to the plea for the want of an oath of verification. He proved, according to the allegations in his plea, that the justice who issued the process and tried the cause, resided in a township different from that in which the defendant lived, or the cause of action accrued, or the process was served, and that a competent justice resided in that township; and having made this proof, he moved the Court to

(a) *Buckley v. Heilbruner*, 7 Ind., 488.

Bliss v. Wilson.

dismiss the action. This motion was overruled and the Court proceeded to hear the cause upon its merits, and gave judgment for the plaintiff.

It is clear, from these facts, that the justice of the peace had no jurisdiction, and that the Circuit Court should have sustained the motion to dismiss, provided the evidence was properly admitted. That it was correctly admitted there can be no doubt. No objection was made to its admission, nor could such an objection have been sustained. The plea to the jurisdiction of the justice not having been questioned either before him or in the Circuit Court, for the want of an oath of its truth, became a good plea, and the defendant below had a right to sustain it by proof. *Hagar v. Mounts*, 3 Blackf. Rep., 57, 261. This Court has also decided at this term, in the case of *Thomas v. Winters*, that in inferior courts of limited and special jurisdiction, matter showing a want of jurisdiction is admissible in evidence under the general issue (1).

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. S. White, for the plaintiff.

I. Naylor, for the defendant.

(1) *Ante*, p. 161.

BLISS v. WILSON.

JUDGMENT BY DEFAULT—RECORD.—In the case of a judgment by default against a defendant, the writ and return are a necessary part of the record (a).

SAME.—The record in such case must show that the defendant had notice of the suit, or the judgment is a nullity (b).

(a) See this case commented on in the *N. A. & S. R. R. Co. v. Welsh*, 9 Ind., 479.

(b) *Hawkins v. Hawkins*, 28 Ind., 66; 8 Ind., 307; 1 Id., 130; 6 Blackf., 30; 7 Id., 548; 8 Id., 335.

[*170] *ERROR to the *Cass* Circuit Court.

BLACKFORD, J.—*Wilson* recovered a judgment by default against *Bliss* in *Huntington* county, before a justice of the peace. Afterwards, a *scire facias* to show cause why execution should not issue upon that judgment, was issued against *Bliss* in *Cass* county by a justice of the peace. *Bliss* appeared to the *scire facias*, and judgment was rendered against him. He then appealed to the Circuit Court. The parties submitted the cause to the Circuit Court, and a judgment was there rendered against *Bliss* for the sum considered to be due.

The objection to these proceedings is, that the judgment in *Huntington* county was rendered against the defendant by default, without his having had notice of the suit.

It has been decided that in the case of a judgment by default, the writ and return are a necessary part of the record. *Nadenbush v. Lane*, 4 Rand., 413. The reason of this is, that the record may always show whether the judgment rendered against a man in his absence was with or without notice of the suit. If he had no notice in cases like the present, the judgment is a nullity. Were the law otherwise, every person would be liable to have judgments rendered against him without cause and without his knowledge.

The transcript of the justice in *Huntington* county shows that process had issued in the cause against *Bliss*, and had been returned; but it does not show that the process had been served. For anything that appears in the record, *Bliss* may not have had any notice, either actual or constructive, of the pendency of that suit; and the judgment against him in the case, therefore, is of no validity. The necessary consequence is, that the *scire facias* and proceedings under it, founded on that judgment, can not be sustained.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. Chase, for the plaintiff.

S. C. Sample, for the defendant.

 Holmes v. Schofield and Another.

[*171] STEWART v. THE STATE, in Error.

AN indictment against a constable under the 48th section of the act relative to crimes and punishments, R. C., 1831, p. 190, for official negligence in not executing a State's warrant, need not contain an averment that the justice who issued the warrant had legal authority to do so; nor an allegation, that previously to the issuing of the warrant, a complaint on oath was made to the justice charging the person to be arrested with the commission of a crime; nor that a crime was committed in the view of the justice.

It is sufficient if the indictment, in such case, set out a warrant legal upon its face.

The State is a "person" within the meaning of the above named section of the statute; and an averment, therefore, that the offense was to the injury of the State is sufficient.

There is not a fatal variance between the name *Beckwith* in a warrant named in an indictment, and *Beckworth* in that produced on the trial. See 20 Ind., 444; 10 Id.. 366.

HOLMES v. SCHOFIELD and Another.

VENDOR AND PURCHASER—CONSTRUCTION OF CONTRACT.—Two persons made a written agreement, by which one of them agreed to sell to the other certain real estate. A part of the price was to be paid on a subsequent day, and notes were to be given for the payment of the residue in equal annual installments. After all the payments should be made, the conveyance was to be executed. There was nothing said in the agreement respecting the possession of the premises. Held, that the legal inference from the contract was, that the possession was to be given when the deed should be executed (a).

APPEAL from the *Marion* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit brought by *Samuel W. Schofield* and *William T. Ball* against *William*

(a) *Wright v. Blackley*, 3 Ind., 101

Holmes v. Schofield and Another.

Holmes. The case stated by the declaration is as follows: On the 19th of *January*, 1835, the parties entered into an agreement, in writing, by which the defendant below agreed to sell to the plaintiffs certain real estate, for the sum of [*172] \$1,800 *The plaintiffs were to pay the defendant \$400 of the purchase-money by the 10th of *April*, 1835, and to give him for the balance four notes of \$350 each, payable annually. After all the payments should be made, the defendant was to give the plaintiffs a warranty deed for the property.

The plaintiffs, on the 10th of *April*, 1835, offered to pay the defendant the \$400, and execute to him the notes as agreed on, if he would give them immediate possession of the premises. The defendant refused to receive the money and notes on the terms proposed.

Those are the material facts set out in the declaration.

To this action, the defendant pleaded the general issue.

The evidence, on the trial, showed the case to be substantially as the declaration states it. Verdict in favour of the plaintiffs for \$500; motion for a new trial made by the defendant overruled, and judgment rendered on the verdict.

We are of opinion that neither the declaration nor the evidence, shows any cause of action. The tender of the \$400 and the notes, in *April*, 1835, was qualified by a demand of the possession of the property. The defendant was not bound to accept the money and the notes on the condition upon which they were tendered. There is no agreement, expressed or implied, in the writing declared on, that the defendant should deliver possession of the premises before the consideration-money was all paid. His agreement was, that if the plaintiffs should comply with their part of the contract, and pay the whole \$1,800, as agreed on, he would then make them a deed. The only legal inference from the contract is, that possession of the property was to be given when the deed should be made. If the plaintiffs were to have possession sooner, that should have been specially provided for in the contract. There is no breach of the defendant's contract shown, either in

 Poundstone v. Lewark and Others.

the declaration or by the evidence, and the judgment against him must be reversed.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, with leave to the appellees to amend their declaration, &c.

H. Brown, C. Fletcher and O. Butler, for the appellant.

J. Morrison, for the appellees.

[*173] *POUNDSTONE v. LEWARK and Others.

CONTRACT—DECLARATION—CONSIDERATION.—A declaration against the defendant for not performing certain work agreeably to his contract, without showing that he was to have anything for the work, contains no cause of action (a).

ERROR to the *Rush* Circuit Court.

BLACKFORD, J.—Assumpsit by *Lewark* and others against *Poundstone*, commenced before a justice of the peace. The cause of action described in the declaration is, in substance, as follows:

The plaintiffs, on, &c., proceeded to sell out the building of a certain chimney to the lowest bidder. The defendant was the lowest bidder, and the building of the chimney was cried off to him, he thereby undertaking to build it in a specified manner, and by a certain time. Breach, that the defendant failed to perform his contract. Damage, fifty dollars.

Demurrer to the declaration, and judgment by the justice for the plaintiffs. The defendant appealed to the Circuit Court. The Circuit Court, considering the declaration good, overruled the demurrer, and rendered a final judgment in favour of the plaintiffs, with costs of suit.

In overruling the demurrer to the declaration, the Circuit Court committed an error. The undertaking of the defendant

(a) *Robinson v. Barbour*, 5 Blackf., 468. But see *Rogers v. Maxwell*, 4 Ind., 213.

Vandagriff v. Tate and Wife, in Error.

to build the chimney was, for anything shown by the declaration, without any consideration whatever. It was a *nudum pactum*. There is no averment that the defendant was to receive anything for the performance of his promise. The following case on this subject occurred in *England* as early as the time of *Henry* the 4th: "A carpenter, by parol without writing, undertook to build a new house, and, for the not doing it, the party brought an action against the carpenter, and it did not appear that he was to have anything for building the house: it was adjudged that he should take nothing by his writ." Powell on Cont., 331. This case is recognized as good law by all the modern decisions. Indeed, it is now settled that even if the plaintiffs' house had sustained a material injury in consequence of the defendant's not building the chimney, the action would not have lain. *Elsee et al. v.*

Gatward, 5 Term Rep., 143. The ground of action [*174] stated in the *declaration before us is nothing more than a non-feasance, where there was no consideration, and the action can not be sustained.

The circumstance that this declaration was filed before a justice of the peace, makes no difference. It is defective in substance, and was therefore objectionable in a justice's Court. *Hall v. Johnson*, May term, 1834.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, with leave to the plaintiffs below to amend their declaration, &c.

J. Perry, for the plaintiff.

C. B. Smith, for the defendants.

VANDAGRIFT v. TATE and Wife, in Error.

In a suit before a justice of the peace, a bond with condition, which appears upon its face to have been executed between the

 Throgmorton v. Davis and Wife.

parties to the suit, may be filed as the cause of action, without an assignment of breaches. *Evans v. Shoemaker*, 2 Blackf., 237.

But a note payable to a woman, who is one of the two plaintiffs in a suit, is not a sufficient statement of the cause of action, without an averment of her marriage with her co-plaintiff. See 5 Blackf., 339; 30 Ind., 331; 8 Blackf., 287.

 THROGMORTON v. DAVIS and Wife.

SLANDER—EVIDENCE OF MALICE.—Slander. Plea, the statute of limitations.

Held, that for the purpose of showing malice in the speaking of the words charged, the plaintiff might prove that the defendant had spoken similar words more than a year before the suit was commenced, but that such evidence was not admissible to aggravate the damages (a).

PRACTICE.—The order of time for the introduction of evidence to support the different parts of an action or defense, must be generally left to the discretion of the party who introduces the evidence (b).

[*175] *ERROR to the *Franklin* Circuit Court.

BLACKFORD, J.—*Davis* and his wife brought an action of slander against *Throgmorton*. The substance of the words set out in the declaration is, that the defendant had said that he could have illicit intercourse with *Davis's* wife, and that she permitted other men to have such intercourse with her. The defendant pleaded the statute of limitations. Verdict and judgment for the plaintiffs.

On the trial, the plaintiffs offered to prove that more than a year before the commencement of the suit, the defendant had said that he could have connection with the plaintiff's wife. The evidence was objected to on the ground that the words were not spoken within a year, which is the time specified by the statute of limitations. The Court, however, permitted the plaintiffs to introduce the evidence for the purpose of proving malice.

(a) *Schoonover v. Rowe*, 7 Blackf., 202; 8 Id., 495.

(b) *Rushville, etc., R. R. Co. v. McManus*, 4 Ind., 275, 10 Ind., 60; 7 Id., 394.

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The admission of this evidence was correct. It was only admitted to show the *motives* of the defendant in speaking the other words which are stated in the declaration, and for which the action was sustainable. Under this view of the subject, it can be of no consequence that the words objected to by the defendant below were spoken more than a year before the commencement of the suit. They tended to show the defendant's *malice*, and it was for that purpose alone they were admitted. This point is expressly decided in the case of *Inman v. Foster*, 8 Wend., 602.

The plaintiff in error says that, at all events, these words were inadmissible, until the words which would support the suit had been proved. We think this is a mistake. The plaintiff below had a right to introduce evidence to prove the defendant's malice, as well as to prove the speaking of the words relied on as actionable; and it can not be material which of these facts was first proved. The order of time for the introduction of evidence to support the different points of an action or defense, must be generally left to the discretion of the party who introduces the evidence.

The Court instructed the jury that they ought to take the words proved, viz.: "that *Davis's* wife was too common with other men," if they believed the witnesses, as the foundation of the action; and that they should "consider all the [*176] rest *proved as mere *aggravation*, as showing the malice or ill-will of the party.

The objection to this instruction is, that by the latter part of it, the jury were permitted to consider, in estimating the amount of damages, words which were not actionable, and which had been spoken more than a year before the commencement of the suit. The language of the Court is not quite clear that the words alluded to might be considered by the jury in aggravation of damages. That, however, seems rather to be the meaning of the Court. At any rate, it is very evident that the jury may have so understood the instruction. It is exceedingly important that the Court should, in cases like the present, be very particular in their information to the jury,

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that the words admitted exclusively for the purpose of showing malice, should not be considered in aggravation of damages. *M^r Glemery v. Keller*, Nov. Term, 1834. The latter part of the instruction objected to is incorrect.

There is one other point, made by the plaintiff in error, which relates to the admission of testimony, but its examination is not material in the decision of the cause.

Per Curiam.—The judgment is reversed and the verdict set aside with costs. Cause remanded, &c.

O. H. Smith, for the plaintiff.

J. Ryman and *G. H. Dunn*, for the defendants.

BOILES v. BARNES.

JUSTICE'S TRANSCRIPT—AMENDMENT.—The transcript of a justice, on an appeal to the Circuit Court by the plaintiff, was as follows: "Given under my hand and seal;" to which were affixed the signature and seal of the justice. A good statement of demand and appeal-bond were sent up, but the transcript did not state that an appeal had been taken. *Held*, that on the motion of the plaintiff the justice might be required to amend his transcript; but if no motion to that effect was made, the appeal, but not the action, might be dismissed on the defendant's motion.

ERROR to the *Delaware* Circuit Court.

DEWEY, J.—On an appeal from the judgment of a justice of the peace to the Circuit Court, the paper which he [*177] filed as a *statement of the proceedings in the cause before him, was authenticated in the following manner only: "Given under my hand and seal," to which were affixed the signature and seal of the justice. It was accompanied by a good cause of action, and an appeal-bond, but contained no statement that an appeal had been taken. In the Circuit Court, the defendant, who had been successful before the justice, moved to "dismiss the suit for want of a sufficient transcript and appeal papers;" upon which the plaintiff immediately moved for "a rule against the justice to certify to the Court a full and correct transcript of the proceedings

The State v. M'Roberts.

had in the cause before him." This latter motion was overruled, the action dismissed and judgment rendered for the defendant for costs.

The objections urged against the judgment of the Circuit Court are, that it is erroneous, because the Court refused the rule on the justice to perfect his transcript, and because the action was dismissed.

The motion, which had for its object the amendment of the transcript, though made subsequently to the other, from its character, was entitled to precedence; and as it is evident from the inspection of the record, that the justice had not sufficiently certified his proceedings, that motion ought to have been successful. The Court erred in overruling it.

The Court also committed an error in dismissing the action against the will of the plaintiff. The record shows that the justice had before him a good cause of action, over which he had jurisdiction. The defects in the transcript, and in the manner of certifying it, do not affect the plaintiff's right of *action*; but they are sufficient, had a motion been made for that purpose, to justify the Court in dismissing the *appeal*.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the filing of the transcript set aside, with costs. Cause remanded, &c.

C. B. Smith, for the plaintiff.

M. M. Ray, for the defendant.

[*178] THE STATE v. M'ROBERTS.

KIDNAPPING—INDICTMENT.—If the description of the offense, in an indictment for kidnapping, agree with the language of the statute, it is sufficient (a).

ERROR to the *Hendricks* Circuit Court.

BLACKFORD, J.—Indictment for kidnapping. The indictment states that the defendant, on, &c., with force and arms,

(a) *The State v. Watson*, 5 Blackf., 155.

Cassaday v. Reid, in Error.

&c., one *Susanna*, a woman of color, then and there being found, did then and there forcibly and unlawfully arrest, carry, and convey away to parts without the State of *Indiana*, to wit, to the State of *Kentucky*; the defendant not having then and there established a claim upon the services of the said *Susanna*, either according to the laws of the State of *Indiana*, or according to the laws of the *United States*; contrary to the form of the statute. This indictment was quashed, on the defendant's motion, by the Circuit Court.

The objections made to the indictment are, that it does not state the woman to be free, nor that she was taken feloniously and against her will. These objections are insufficient. The statute has defined the offense and affixed the punishment. Rev. Code, 1831, p. 183. The indictment in question charges, that the woman was forcibly and unlawfully arrested and taken away to another State by the defendant, without his having established his claim to her services, &c. This description of the offense agrees with the language of the statute, and is therefore sufficient.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. Herod, for the State.

W. Quarles, for the defendant.

CASSADAY v. REID, in Error.

IF an appeal to the Circuit Court from the judgment of a justice, be dismissed by the appellant in vacation [*179] under the *statute of 1834, before the defendant has appeared, the appellant is not subject to the payment of a docket-fee. And the mere entry in the case of an attorney's name for the defendant on the issue-docket is not an appearance.

As the amount in controversy in such case (relative to the allowance of a docket-fee) is less than twenty dollars, the Supreme Court has no jurisdiction of the cause.

Rucker, an Infant, v. M'Neely.

RUCKER, an Infant, v. M'NEELY.

INFANT.—An infant may sue by guardian.

TRESPASS—VENUE.—In a declaration in trespass *quare clausum fregit*, the name of the county was in the margin, and the close was described as situated in that county. *Held*, that the venue was well laid.

SAME—DECLARATION.—If a person cut down another's trees, the trespasses, if repeated, may be laid in the declaration to have been committed on different days and times, though they can not be laid with a *continuando* (a).

SAME.—The declaration in trespass *quare clausum fregit* charged the defendant with breaking the plaintiff's close, and then and there cutting down certain trees, &c. *Held*, that the breaking the close was the gist of the action, and the cutting down the trees only matter of aggravation. *Held*, also, that it was no objection to the whole count, in such case, that the matter in aggravation was not well laid (b).

ERROR to the Shelby Circuit Court.

BLACKFORD, J.—Trespass *quare clausum fregit*. Special demurrer to the declaration, and judgment for the defendant.

The declaration commences as follows: *Shelby county, ss.: Elzy Rucker, by Westley Rucker, who is admitted by the Court here to prosecute for the plaintiff, who is an infant within the age of twenty-one years, as the guardian of the said plaintiff, complains, &c.* It is stated as one of the causes of demurrer, that the plaintiff should have sued by *next friend*, and not by guardian. In this the defendant is mistaken. The institution of the suit by guardian is unobjectionable, and the form of the declaration in this particular is correct. 1 Th. Co. Litt., 137, note (29); 2 Saunders' Rep., 117, f. note (1).

It is also stated as a cause of demurrer that, in alleging the trespass complained of, there is no venue laid in the declaration. Here, however, the defendant is also mistaken. There is a venue in the margin of the declaration, for we there
 [*180] find *the words, *Shelby county, ss.*, with which words the declaration commences. The declaration afterwards alleges that the defendant with force and arms entered

(a) *Holcraft v. King*, 25 Ind., 352.

(b) See *Green v. Boody*, 21 Ind., 10; *Graham v. The C. & I. C. R. R. Co.*, 27 Id., 260.

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the plaintiff's close, situated in the county of *Shelby* aforesaid, and there cut down the trees then and there growing. The venue thus laid is sufficient, even on special demurrer. *Duncan v. Passenger*, 8 Bingham, 355; *Capp v. Gilman*, in this Court, May term, 1827.

Another cause of demurrer assigned is, that the trespass complained of is incorrectly laid with a *continuando*. This objection is not valid. The declaration avers that the defendant, on the 20th of *November*, 1835, and on divers days and times between that day and the commencement of the suit, with force and arms, entered the close, &c. This is not alleging the injury to have been committed by *continuation* from one specified day to another. It is an allegation that the defendant had committed several distinct acts of trespass at different times, within a specified period. *Blackstone* states the law on this subject as follows: "Where the trespass is by one or several acts, each of which terminates in itself, and being once done can not be done again, it can not be laid with a *continuando*; yet if there be repeated acts of trespass committed (as cutting down a certain number of trees), they may be laid to be done, not *continually*, but at divers days and times within a given period." 3 Blacks. Comm., 212. In *Saunders' Reports*—the authority cited by the defendant himself—it is said that where a man cuts down another's trees, the trespasses, if repeated, may be laid to have been committed on different days and times, though they can not be laid with a *continuando*. 1 Saund. Rep., 24, note (1).

The last cause of demurrer assigned is, that the trees alleged to have been cut down and carried away by the defendant are not averred to be the plaintiff's property. The declaration charges that the defendant on, &c., with force and arms, entered a certain close of the plaintiff, situate, &c., and then and there felled, cut down and destroyed, the trees then and there growing, &c., and took and carried them away, &c., and other wrongs to the plaintiff then and there did against the peace, and to the plaintiff's damage \$500. This part of the declaration alleges the close said to have been broken to belong to

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the plaintiff, but it does not allege the trees charged to have been cut down to be the plaintiff's property. The [*181] demurrer is to the whole declaration, and the question for us to decide is, whether the defect in the averment respecting the trees destroys the validity of the whole declaration?

This is an action of trespass *quare clausum fregit*. The gist of the action is the breaking and entering the plaintiff's close, and the declaration would have been good, had there been nothing said in it respecting the cutting down and carrying away the trees. The allegation respecting the trees is only as to matter in aggravation of damages. This point is settled in the following case: *Chamberlain* sued *Greenfield* in trespass. The declaration was for breaking and entering the plaintiff's house, and damaging his goods there. Demurrer to the declaration, because the goods were not sufficiently described. The defendant relied on *Playter's* case, 5 Co. Rep., 35. The Court overruled the demurrer, on the ground that the breaking and entering the house was the foundation of the action, and the rest only laid by way of aggravation. *Chamberlain v. Greenfield*, 3 Wils. Rep., 292.

It is a question of no consequence to the plaintiff's *right* to recover, whether the matter in aggravation be well laid or not. Such matter need not be proved by the plaintiff, nor answered by the defendant. Lawes on Plead., 70. If the matter defectively stated by way of aggravation would, of itself, bear an action, the proof of it may be objected to in consequence of the defective statement. 1 Chitt. Plead., 443. But still, if the *gist* of the action, viz: the breaking and entering the close, be proved, the plaintiff must recover something. It can be no objection, therefore, to the whole declaration, that the matter in aggravation is not well laid. If the fact of cutting and carrying away the trees had been charged, as it might have been, in a separate count from the one for breaking the close, a demurrer to the whole declaration, because the trees were not alleged to be the plaintiff's, must have been overruled. The reason why the demurrer in such a case would be overruled is,

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that the declaration would contain a good cause of action, independently of the defective count. It follows, of course, that where, as in the present case, the defective statement is in the same count, and is only of matter in aggravation of damages, the demurrer to the whole declaration merely on account of such defective statement, can not be sustained.

We are of opinion, for these reasons, that the judgment of [*182] the Circuit Court sustaining the demurrer to the declaration is erroneous, and must be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

J. Ryman, for the plaintiff.

C. Fletcher and *O. Butler*, for the defendant.

HIGGINS v. STRONG and Others.

PATENT RIGHT.—The exclusive right of property in the invention of, or improvement on any new and useful art, machine, &c., is the creature of statutory law, and must be strictly regulated by its provisions.

SAME—ASSIGNMENT OF.—The assignment of a patent right is not valid, unless the assignment be recorded in the office of the Secretary of State of the *United States*, and a note given to an assignee for such a right, whose assignment had not been so recorded, is invalid for the want of consideration (a).

ERROR to the *Henry* Circuit Court.

DEWEY, J.—Debt by the assignee of a promissory note against the makers. Plea, that the note was given in consideration of the sale, by the plaintiff's assignor, the payee of the note, to defendants, of the right to use and vend, within the territory of *Michigan*, *Stagnor's* patent truss for curing hernia, the seller representing himself to be the assignee of

(a) This decision was followed in the cases of *McFall v. Wilson*, 6 Blackf. 260, *Mullikin v. Latchem*, 7 Id., 136, and *Louden v. Birt*, 4 Ind., 566. But in *McKernan v. Hite*, 6 Ind., 428, the Court held that to render the assignment of a patent valid, under the act of Congress approved July 4, 1836, it is not essential that it shall have been recorded.

Stagnor of the patent right, and that he had good right and authority to sell the same. The plea then avers that "he had not procured his assignment of the patent truss, to be recorded in the office of the Secretary of State of the *United States*," wherefore he had no right to sell, &c., and that the note was without consideration, and void. General demurrer, and judgment for the defendants.

The question for us to decide is, whether the recording an assignment of a patent right in the office of the Secretary of State of the *United States* is essential to its validity? If it is, it follows, of course, that the payee of the note in question was not the legal assignee of *Stagnor*, and that by his sale to the defendants of the right to use and vend the truss nothing passed, and that the note is, therefore, invalid for the want of consideration.

[*183] *By the act of Congress of *February* 21, 1793, 4th section, it is provided that "it shall be lawful for any inventor, his executor or administrator, to assign the title and interest in said invention at any time; and the assignee having recorded the said assignment in the office of the Secretary of State, shall thereafter stand in the place of the original inventor, both as to right and responsibility; and so the assignees of assigns, to any degree." Whether the exclusive property of authors in their literary productions, after publication, is of common law or statutory origin, has been debated with great zeal, learning and ability, both in this country and *England*. The better opinion in the *United States* seems to be that the right is of the latter character; and it has been decided that the copyright is forfeited, unless every requisition of the statutes regulating it is observed. 8 Peters' Rep., 664, 665. *Wheaton & Donaldson v. Peters & Grigg*. But that the exclusive right of property in the invention of, or improvement on, "any new and useful art, machine," &c., is the creature of statutory law, and must be strictly regulated by its provisions, has never been doubted.

If the patentee fail to observe all the prerequisites prescribed by the statute, his right is defeated. Nor can his assignee

Nooe v. Higdon, in Error.

acquire any right to his invention, unless he complies with the mode of assignment pointed out by the law authorizing the transfer. In the case before us this has not been done. The record informs us that the assignment of the patentee had not been recorded in the office of the Secretary of State of the *United States*. This was essential to the validity of the title of his assignee, and without it he could invest no right in the purchaser of his claim. 8 Mass. Rep., 46; 4 Mason's Rep., 15.

The plea is a bar to the action, and the demurrer was properly overruled.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

C. B. Smith, for the plaintiff.

O. H. Smith, J. Rariden and J. S. Newman, for the defendants.

[*184] *HALE v. WOODRUFF, in Error.

HELD, that the president and trustees of *New Albany* were not authorized, by the act of incorporation of 1832, to extend the limits of the corporation so as to include the outlots of the town, without the consent of a majority of the resident owners of such lots.

NOOE v. HIGDON, in Error.

TRESPASS *quare clausum fregit*, for breaking the plaintiff's stable and taking away his horse. Pleas, 1st, That the stable was in the possession of the defendant and one A as tenants of the plaintiff; that the horse belonged to the defendant and A, and was in A's part of the stable, &c 2d, That

Hurd v. Earl, in Error.

B had obtained a judgment against *C* before a justice, and that the defendant and *A* were *C*'s replevin-bail; that a *fi. fa.* was issued on the judgment and delivered to a constable; that the horse was *C*'s, but the plaintiff kept him concealed and locked up in the stable, and refused to deliver him, &c.; and that the defendant, by *A*'s permission, opened the stable, &c. Replications to these pleas, and issues. *Held*, on the trial, that *A* was a competent witness for the defendant.

If an execution be proved to be lost, its contents may be proved by parol evidence.

HURD v. EARL, in Error.

A PROMISSORY note for the payment of money executed by the plaintiff to a third person, and assigned to the defendant before the commencement of the suit, is a legal matter of set-off.

It is not necessary that a plea of payment and [*185] set-off under *the statute, should show that the amount claimed as a set-off is equal to the plaintiff's demand.

If such a plea be filed, and it be found on the trial that part only of the demand has been paid, the plaintiff is entitled to judgment for the residue; but if it appear that the plaintiff has received more than the amount of his claim, the defendant obtains judgment for the overplus. Rev. Code, 1831, p. 405 (1),

(1) Accord. Rev. Stat., 1838, p. 450.

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HINCKLEY v. O'FARREL.

NOTARY PUBLIC—SEAL.—The official acts of a notary public must be authenticated by his official seal, and not by a scrawl (a).

ERROR to the *Floyd* Circuit court.

M'KINNEY, J.—This is a writ of domestic attachment. It was dismissed by the Circuit Court. The attachment is founded on an award, and several grounds are taken in support of the judgment below; among which, it is only necessary to notice that which denies the affidavit, the foundation of the proceeding, to be legally authenticated.

The affidavit was taken by a notary public, and his authority to take such, if it exists, is given by the act of 1833, "declaratory of the powers of notaries public." The act authorizes each and every notary public to take and certify all affidavits and depositions, authorized to be taken and certified by justices of the peace, and to take and certify all proofs of deeds, &c.; and it provides that his certificate and attestation, with his official seal, shall be taken and received in all cases to be of equal verity and validity with the certificate, attestation and seal of a clerk of the Circuit Court (1). It is contended, that if the notary public be authorized to take the affidavit of one applying for the writ of domestic attachment, the affidavit in this case is not legally authenticated; his certificate not being attested by his official seal.

The certificate and attestation attached to the affidavit are as follows: "Sworn to this 7th day of *January*, 1835, at the county aforesaid, before the undersigned, a notary public of said county. *R. Crawford*, N. P., F. C. [Seal]."

[*186] *We think the objection to the certificate well taken.

It is certainly not attested as contemplated by the statute establishing the office and defining the duties of notaries public. The seal attached to the certificate is simply

(a) The statute requires notaries before acting to procure a seal, etc. 1 R. S. (G. & H.) p. 446.

Rogers v. Worth.

a scrawl, and such as could not have been intended. By the third section of the act, "each notary public shall procure a seal, which shall be called the seal of the notary public." The substitution of a scrawl for the seal thus prescribed, is not warranted; and for this defect, the Circuit Court was correct in dismissing the attachment.

DEWEY, J., having been of counsel in the cause, was absent.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

R. Crawford and H. P. Thornton, for the plaintiff.

(1) Stat., 1833, p. 44. Accord. Rev. Stat., 1838, p. 420.

HILLIGOSS v. BOND, in Error.

THE payee of a promissory note may sue on the original consideration for which the note was given. *Hanna v. Pegg*, 1 Blackf., 181.

ROGERS v. WORTH.

FRAUD—ONUS PROBANDI.—If the plea to an action on a writing obligatory be that the obligation was obtained by fraud, the *onus probandi* lies on the defendant.

ERROR to the *Fayette* Circuit Court.

M'KINNEY, J.—Debt against the obligor on an assigned writing obligatory. To a plea of fraud, covin and deceit, practiced by the payee of the note on the sale of a washing machine, in fraudulently representing himself to be the inventor and patentee of the same, &c., there was a [*187] general replication. The *cause was submitted to

Perkins v. Conley and Another, on Appeal.

the Court without the intervention of a jury, and judgment rendered for the plaintiff.

From a bill of exceptions, it appears that no other evidence was offered but the writing obligatory. It is contended that this was not sufficient to warrant a judgment in favor of the plaintiff below, but that he should by proof have repelled the charge of fraud. This question was recently before us in *Towsey v. Shook*, 3 Blackf., 267, and there settled that the proof in support of the charge devolved upon the defendant; the plea being affirmative, and there being nothing in its character to take it out of the rule requiring affirmative pleas to be proved.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

C. B. Smith, for the plaintiff.

S. Bigger and J. Perry, for the defendant.

PERKINS v. CONLEY and Another, on Appeal.

DECLARATION in assumpsit by *Thomas Conley and George W. Hume*, trading under the firm of *Conley & Hume*, against *John Perkins*: 1st count, That the defendant and one *William S. Bussell*, on, &c., made their promissory note, &c., and thereby jointly and severally promised to pay the said *Conley & Hume* the sum of, &c. By reason whereof [*188] the defendant *became liable, &c., and being so liable promised to pay, &c. 2d count, That the defendant, on, &c., made his other promissory note, and thereby promised to pay the said *Conley & Hume*, the plaintiffs, the sum of, &c. By reason, &c. Breach, that the defendant had not paid, &c.

Demurrer to the first count: Causes, 1st, No profert; 2d, No averment of non-payment by *Bussell*; 3d, No averment that the note was payable to the plaintiffs by their partnership name. Demurrer to the second count: Causes, the first two above-named.

Held, that the counts were sufficient.

Thompson and Another v. The State.

GOSE v. PORTER, in Error.

A SUIT commenced before a justice of the peace was entitled, "*George Gose—James Jesse, agent, v. John Porter;*" and a note executed by the defendant to *George Gose* alone was filed as the cause of action. *Held*, that *Gose* must be considered as the only plaintiff, and that the note was legal evidence in the suit.

SMITH v. THE STATE, in Error.

IN prosecutions for bastardy under the statute providing for the support of illegitimate children, it must appear that the mother of the child was unmarried and a resident of the State. [This is not now the law. See *Cuppy v. The State*, 24 Ind., 389.]

THOMPSON and Another v. THE STATE.

JOINT SCIRE FACIAS.—In the case of a separate fine against two persons for a contempt, a joint *scire facias* against them to show cause, &c., is not sustainable (a).

ERROR to the Clark Circuit Court.

M'KINNEY, J.—The Circuit Court, for an alleged contempt, ordered a fine of twenty dollars to be entered against each of the plaintiffs in error. A joint *scire facias* issued on that order, requiring the defendants below to show cause why a *capias pro fine* should not issue against them. The defendants appeared,

(a) *Hildreth v. The State*, 5 Blackf., 80; *Wellman v. The State*, Id., 343; *Lockwood v. The State*, 7 Id., 417.

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and moved to quash the *scire facias*; which motion being overruled, they then demurred; their demurrer was also overruled, and a judgment entered, awarding execution against each defendant severally.

The *scire facias* can not be supported. There was no privity between the defendants. The fine was against each [*189] *severally, and there was, consequently, no ground for a joint *scire facias*.

DEWEY, J., was absent.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

I. Naylor, for the plaintiffs.

W. Herod, for the State.

LINDLEY and Another v. KINDALL.

SECURITY FOR COSTS—WAIVER.—If at the term to which a rule on a non-resident plaintiff to give security for costs is returnable, the defendant without noticing the rule plead to the merits and go to trial, he waives the benefit of the rule.

DRAWING OF JURORS.—In the course of drawing the names of jurors from the box for the Circuit Court, it was discovered that some of the persons whose names had been drawn were not freeholders nor householders. The names of such unqualified persons were then rejected, the other names which had been drawn were again put into the box, and in the place of the rejected names others were also put into the box. *Held*, that this proceeding was not objectionable.

SWEARING JURY—FORM OF OATH.—There were two issues of fact, and the jury were sworn to try the issue. *Held*, that it was too late for the defendant, after verdict and judgment against him, to object to the informality of the oath to the jury (a).

ERROR to the *Crawford* Circuit Court.

BLACKFORD, J.—*Kindall* brought an action of trespass for an assault and battery and false imprisonment against *Lindley* and *Stallcup*.

(a) *Applegate v. Boyles*, 10 Ind., 435.

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At the term in which the declaration was filed, viz., the *April* term, 1834, the Circuit Court, on an affidavit of the non-residence of the plaintiff below, granted a rule on him to show cause, at the next term, why the suit should not be dismissed for want of security for costs. At the following term, in *October*, 1834, the defendants, without any notice being taken of the rule respecting security for costs, pleaded the general issue and a plea in justification; and the plaintiff joined issue on these pleas. The jurors being called to try the cause, the defendants challenged the array, but the challenge was overruled. The jury were afterwards sworn to try the issue joined. Verdict and judgment for the plaintiff below.

The first objection made to these proceedings is, that no disposition was made of the rule relative to security for [*190] costs. *This objection has no foundation. The rule was waived by the defendants in consequence of their paying no attention to it at the time it was returnable, or at any time afterwards during the progress of the cause.

The second objection is, that the challenge to the array should have been sustained. The following are the facts connected with the challenge. At the *May* term, 1834, of the county commissioners' court, the drawing of the names of persons as jurors for the Circuit Court, conformably to the statute, was commenced. After the clerk had drawn from the box the names of a number of persons, it was discovered that some of the persons whose names were thus drawn were not freeholders or householders. The names of the unqualified persons were then rejected, the other names which had been drawn were again put into the box, and in the place of the names rejected other names were also put into the box. The names of the legal number of qualified jurors were afterwards drawn. This proceeding of the commissioners in obtaining the names of the jurors is not liable to any objection. The mode pursued, when the mistake mentioned was discovered, was perfectly correct.

The last objection to the judgment is, that the jury were only sworn to try the issue joined between the parties, when

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they should have been sworn to try the issues. This objection can not be sustained.

Per Curiam.—The judgment is affirmed with three *per cent.* damages and costs. To be certified, &c.

H. P. Thornton, for the plaintiffs.

J. R. E. Goodlet, for the defendant.

 SPADER and Others v. FROST and Another.

EXECUTION-DEBTOR—ESCAPE.—If an execution-debtor escape from the prison bounds, the bond for the limits is forfeited; and his subsequent voluntary return to the bounds before the commencement of a suit on the bond, is no defense to such suit.

SAME—BOND.—Such a bond for the limits, though it should be insufficient under the statute, may still be good at common law.

SAME.—Although the condition of such a bond do not contain a recital of the matters which led to its execution, and which show a connection [*191] between it and *the obligee, the bond may still be sued on, and the omission be supplied by averments.

SAME—MEASURE OF DAMAGES.—In an action on such a bond, the measure of damages is the amount of the debt for which the debtor was committed, together with interest and costs.

SAME—PLEADING.—The replication in such a case, setting out the condition of the bond, &c., should aver the existence of a judgment on which the execution issued, and it should conclude with a verification.

SAME.—It is a good plea to a suit on such a bond that the execution-debtor left the bounds with the previous consent and license of the plaintiff.

APPEAL from the *Montgomery* Circuit Court.

DEWEY, J.—Debt by *P. G. and J. Frost* against *Spader, Crane and Ketcham*, on a bond for the penalty. The defendants craved *oyer* of the obligation and condition. The former is in the usual form, the latter as follows: “The condition of the above obligation is this, that if the above-bound *Spader*, from and after the date of these presents, shall continue a true prisoner in the custody of the jailor or prison keeper, and within the limits of the prison bounds in the county and State aforesaid, without attempting any manner of escape, until

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discharged by law, then this obligation to be void, otherwise to remain in full force and virtue." The defendants pleaded, first, general performance of the condition; secondly, that although, on, &c., *Spader* departed without the prison bounds, he afterwards, and before the commencement of the suit, voluntarily returned within them, and had ever since remained a true prisoner, without attempting any manner of escape; and thirdly, *Crane* and *Ketcham*, without *Spader*, pleaded that *Spader* left the prison bounds by the consent and license of the plaintiffs previously given, and that he had not made, or attempted to make, any other escape than his departure in pursuance of such consent and license.

To each of the two latter pleas the plaintiffs demurred generally, and had judgment on each demurrer. To the first plea they replied, denying the performance of the condition alleged by the defendants, averring that on, &c., *Spader* was in the custody of the sheriff of *Montgomery* county, by virtue of a *ca. sa.* in favour of the plaintiffs (setting it out); that being desirous to obtain the benefit of the prison bounds, he, together with the other defendants, executed the bond, and that, in consideration thereof, he was admitted to the liberty of the jail limits. The replication then assigns the breach of the condition of the bond by the escape of *Spader* [*192] from the bounds of *the prison, and concludes to the country. To this replication the defendants demurred specially. Judgment on the demurrer for the plaintiffs, and a jury to inquire of the damages.

The plaintiffs offered in evidence the record of a judgment in their favour against *Spader*, rendered in the *Montgomery* Circuit Court, and also the *ca. sa.* on which he was imprisoned. To the admission of each of which as evidence the defendants objected; the objections were overruled, and both were read to the jury. The defendants then offered to prove to the jury, in mitigation of damages, the insolvency of *Spader*, and that he left the prison bounds with the consent of the plaintiffs. This evidence was objected to by the plaintiffs, and excluded by the Court. After the testimony was closed, the defendants moved

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the Court to instruct the jury that they should assess such damages as the plaintiffs had actually sustained by the escape of *Spader*, and that they were not bound to find the whole amount for which he was imprisoned, unless the real loss of the plaintiffs should be found to equal that sum. This instruction the Court refused to give, but charged the jury that the sum for which *Spader* was imprisoned should be the measure of damages to be found by them. The defendants excepted, severally, to all the decisions of the Court respecting the testimony and instructions to the jury. The verdict was in accordance with the instructions, and there was a final judgment for the plaintiffs, from which defendants appealed.

Many objections have been urged against the validity of this judgment. Among them are the following, which we shall now consider without regard to the order in which they present themselves upon the record.

1. That the Court erred in sustaining the demurrer to the second plea of the defendants.

That plea alleges the return of *Spader* into the prison bounds soon after his escape, and his continuing there a true prisoner until the commencement of this suit. The appellants very properly contend that such a defense would have been available by the sheriff in an action against him for a negligent escape, but they erroneously suppose that there is an analogy between the defense to which he would have been entitled, and their rights as defendants in this case. When a debtor is

committed to the custody of the sheriff for the [*193] purpose of *enforcing the claims of the creditor, he is responsible for his safe-keeping, at least on final process, against all contingencies excepting those arising from public enemies and providential occurrences. If the prisoner escape by other means, even without any fault of his keeper, the law implies negligence on the part of the latter, and gives a remedy to the creditor against him. The rigor of his responsibility is, however, so far relaxed as to excuse him, if by his own diligence, or by a voluntary return, the prisoner is again placed in his custody. The recaption, by our statute,

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must take place within three months. If the escape be by the consent, or through the connivance of the officer, the recovery of the prisoner will not excuse him. The action against the sheriff is founded on tort, consisting in the violation of an official duty, the performance of which is designed by the law to be strictly enforced, for the protection of important interests connected with it. This action is based on a contract, by which the defendants bound themselves that *Spader* should remain within the prison-limits, until duly discharged. By this contract, *Spader* enjoyed benefits he would not have had without it. Its object was to lessen the evils of his situation, without impairing the security of his creditors. Whether he would observe this contract, and continue to be a pledge for the debt for which he was in custody, or incur the consequences of violating the contract and withdrawing the pledge, was entirely optional with him. He surely can not maintain that there is any analogy between his situation, and that of a sheriff whose prisoner has escaped without his consent and against his will. Between *Spader's* voluntary breach of the condition of his bond, and an escape by the consent of the sheriff, there may indeed be some analogy; and both are followed by the same effect—an absolute responsibility. It can not be doubted that the unauthorized departure of *Spader* from the prison-bounds, was a breach of the condition of his bond, and produced a forfeiture of it. The right of action instantly accrued upon the committing the breach, and could not be defeated by his return to imprisonment. 7 Johns. Rep., 168, *Kip v. Brigham et al.*; 16 Johns. Rep., 181, *Sweet v. Palmer*; 2 Litt. Rep., 218; 3 Mass. Rep., 86. The demurrer to the second plea was correctly sustained.

2. It is contended that the bond is invalid because it does not conform to the statute under which it was given.

[*194] *This objection arises from one of the causes of demurrer to the replication, which does not show whether the penalty of the bond is, or is not, in double the amount for which *Spader* was imprisoned. Our statute regulating “prisons and prison-bounds,” requires that the

penalty of the bond to be given to enable the prisoner to have the benefit of the prison-bounds, shall be "in double the sum for which such prisoner stands committed." It is a sufficient answer to the objection now under consideration, to say that the replication furnishes no evidence that the penalty is not such as the statute requires. As the amount which was due on the execution averred in the replication, is left uncertain in consequence of certain unspecified credits therein mentioned, we have no information as to the precise sum for which *Spader* was committed, and of course know not whether the penalty of the bond is double that sum or not. We are therefore unable to pronounce whether the bond, in this respect, is valid or invalid under the statute. But admitting that the penalty does not conform to the requisition of the statute, that would not be a good objection to the sufficiency of the replication, for the bond would not, for that reason, be a nullity. The facts disclosed by the replication, that *Spader* was imprisoned by virtue of the *ca. sa.* in favour of the plaintiffs, that he was desirous of availing himself of the benefit of the prison-bounds, and that he did actually receive that benefit in consequence of executing the bond, constitute a good consideration, and render that instrument binding upon him and his sureties at common law. 7 Mass. Rep., 98; *Id.*, 200; 8 *Id.*, 373; 3 Conn. Rep., 63; 1 Munf. Rep., 508.

3. Another cause of demurrer to the replication is, that the bond on its face shows a want of consideration.

This objection is predicated upon the fact, that the condition of the bond contains no recital of the matters which led to its execution, or which show a connection between it and the plaintiffs, and must have prevailed had not the bond been aided by the averments in the replication. It has already been seen that these averments set forth a good consideration for the obligation. They are explanatory of the circumstances under which it was executed, and show the propriety of the condition. *Chitty* says, "where a variety of facts preceded the contract, and are so connected with it that the
[*195] statement of *them is necessary to render the count

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intelligible" (and the same may be said of any other stage of the pleading), it is proper to aver them "in the description of the consideration or of the contract." 1 Chitty's Pl., 318, 395. Accordingly we find decisions of high authority, in which obligations both common law and statutory, similar to the one in question, have been sustained. In one case, the bond was a common law instrument, executed to the marshal of the King's Bench, conditioned that the obligor, being a prisoner in the marshalsea, should remain a true prisoner, without attempting any manner of escape. 1 Saund., 15. In two other cases, the bonds were executed under the statute 23 Henry 6, c. 9, to the sheriff. That statute provides that sheriffs, &c., "should let out of prison all manner of persons by them arrested or being in their custody, by virtue of any writ, bill, warrant, &c., upon reasonable sureties to keep their days," &c. In all the three cases, the declaration was upon the obligatory part of the bond, and the condition was spread upon the record by *oyer*. None of the conditions contain a recital explanatory of the cause of making the contract. But the pre-existing facts, connected with the execution of the bond, are in each case averred in some stage of the pleadings subsequent to the declaration. No objection was taken on the ground of the absence of the recital in the condition, although in one of the cases, the validity of the bond was brought directly before the Court by demurrer. 1 Saund., 156; 2 Saund., 75. It is true that Chitty gives a more approved form of bonds under the statute of Henry 6, in which the condition contains a recital, at length, of all the facts conducing to the contract; but he states that the obligor is not bound to make such recital. 3 Chitt. Gen. Prac., 364. The condition of the bond, which is the foundation of this suit, contains nothing inconsistent with our statute. On the contrary, its phraseology is the same as that of the statute. If its penalty be such as the act requires, it is a valid statutory instrument. The objection to the replication under consideration cannot be sustained.

4. It is urged that the instruction of the Court to the jury,

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that the sum for which *Spader* was committed on the execution, was the legal measure of damages and should be the amount of the verdict, was wrong.

By the common law, in an action on a penal bond, [*196] the *plaintiff could assign only one breach of the condition. If the jury found the issue in his favour the obligation was forfeited, and judgment was rendered for the penalty. The remedy of the defendant was in equity, where, upon a full view of all the circumstances, the Court reduced the judgment to the sum in which the plaintiff had been really injured by the violation of the contract. As this mode of arriving at justice was dilatory and expensive, the statute of 8 and 9 *Will.*, 3, similar in its provisions, to those in our practice act on the same subject, was passed, providing that the plaintiff might assign several breaches, and that the jury should assess such damages as he could prove he had sustained. In performing this equitable office, however, the jury has always been governed, in certain cases, by prescribed rules of law operating as a measure of damages, according to the character of the transaction between the parties. As for instance, if the covenant broken is for the delivery of personal property, its value at the time the article is stipulated to be delivered is the criterion of the verdict. If the action is for the breach of the covenant of seisin in a conveyance of real estate, the consideration-money and interest from the time of payment is the measure. On bail-bonds for the appearance of a defendant, the amount of the debt in the original action, or at least the sum named in the affidavit for bail, if it be less than the judgment, is to govern the assessment of damages. This class of cases bears a close resemblance to that presented by the record. In both, the body of the debtor is considered as a security for the debt, and in *England* inquiry is never made into the circumstances of the debtor, with a view to mitigate the damages occasioned by the breach of the condition of the bond. In a large majority of litigated cases on bonds with condition, however, it must be admitted that the jury are necessarily left to the exercise of a sound discretion, in fixing

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upon the amount of injury a party has sustained in consequence of the violation of the contract.

Our statute authorizing prison-bonds-bonds, is silent as to the damages which are to be awarded upon a breach of their conditions. But it gives the creditor a right of action upon them, upon the escape of the prisoner, whether he be confined upon mesne process or execution; and it takes away the remedy which would otherwise have existed against the sheriff,

holding him only responsible for the sufficiency of the [*197] sureties. In *giving a construction to this statute, we must have regard to the law as it stood at the time of its passage, and the rights and interests which are designed to be affected by it. It is very evident that the amelioration of the condition of the prisoner by relieving him from close confinement is the principal object of the law. But in performing this office of humanity to the debtor, it can hardly be supposed the legislature designed to impair the remedy of the creditor. That they meant to transfer, and have transferred that remedy from the sheriff to the sureties of the escaping prisoner to some extent, is certain. Before the passage of the statute, the remedy against the sheriff was well defined and clearly understood, in cases of escapes from imprisonment on execution. It was equally well established when the escape is from mesne process; but to this species of escape, on the present occasion, we pay no attention, and mean to settle no principle in regard to it; and we also leave out of view the extent of the liability of the sheriff in an action on the case for escape from final process. By virtue of the statute of 2 Westm., c. 11, which is in force in this State, the sheriff was amenable to the creditor in an action of debt for escape from execution to the full extent of the debt—not by any direct expression of that act, but by an equitable construction given to it by the *English Courts* soon after its passage, which has ever since been adhered to by them and by the courts of such of the States as have adopted the statute, and it is believed that it prevails in all, or nearly all, of them.

It has been urged in argument that there is better reason for

holding the sheriff thus liable than there is for imposing the same liability on the escaping debtor and his sureties, because the sheriff has the right of recaption, and the bail has not. We draw a different conclusion from these premises. If the liability of the sheriff is the consequence of his right to re-commit, it would follow that in voluntary escapes he would not be liable at all, for in such escapes he has no right to retake. The truth is, as has been already observed, that the privilege of the sheriff to re-capture after a negligent escape, is a mere mitigation of the rigorous responsibility which the policy of the law has thrown upon him, to insure his vigilance and honesty in the discharge of his trust, and excuses him only when without any fault of his in the escape, he shall restore to the creditor the means of enforcing the payment of [*198] the debt by his hold *upon the debtor. When a prisoner has taken the benefit of the prison-limits, the sheriff has no longer any right to restrain, or to re-commit him if he escape. 4 Johns. Rep., 45. Admit that the creditor, in such a case, has the right to issue another execution, or to commence suit on his judgment—with regard to which we give no opinion—we can not believe that the legislature designed to substitute a remedy so very precarious in the place of the sure resort which he possessed against the sheriff. Nor can we perceive why a debtor, who has abused the privilege which the law gives him, as well as the confidence of his bail, should stand in a better situation than he would had he effected the more difficult and less discreditable task of breaking from close confinement. It may be said his sureties are not in fault, and this may be true; still, there can not be one rule of damages for the principal and another for them. The contract of all has been broken, and it is but just that the burthen should fall upon those whose confidence in the wrong-doer enabled him to inflict the injury.

We think, too, that the construction of the statute contended for by the appellants—which is, that such damages only as might appear to have been sustained by the escape, taking into view the insolvency of the debtor (if such be the fact), would

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be of dangerous tendency, by holding out temptation to fraud and collusion between the prisoner and his friends. Without possessing visible property, he might have the means of paying his debts. In such cases, it would be easy for a dishonest debtor to procure bail for the prison-bounds, effect his escape, and his sureties be able to reduce the damages to a nominal sum by seeming proof of his insolvency. Such a construction of this statute would be almost tantamount to abolishing imprisonment for debt. If such a result be desirable, the power to produce it lies in other hands than ours. As the law is, we consider the body of a debtor in execution in the character of a pledge for the debt, and therefore conclude that the instructions which the Court gave to the jury were right, and might also have embraced the interest and cost.

In accordance with this opinion are the decisions of several of the States, and we know none to the contrary. It is true, that in *North Carolina* and *Kentucky* the rule of damages has been held to be different in actions upon sheriffs' and jailers' official bonds for the escape of an imprisoned debtor.

[*199] We apprehend, however, that there is a manifest difference between the rules which ought to govern the decision of such cases, and those applicable to the case before us. Besides, in *Kentucky*, on bonds for the prison-rules, the obligors have been held to be liable for the amount of the debt, interest and costs; and the statute of that State, like ours, is silent as to the measure of damages. In both those States the sheriff, under a different form of action, is liable for the whole debt—in the former by motion, and in the latter by virtue of the statute of 2 Westm., c. 11. In *Pennsylvania*, in a suit on his official bond, the sheriff is not allowed to give in evidence in mitigation of damages, the insolvency of the escaping debtor. The following cases are directly in point, and fully sustain the opinion just pronounced. 7 Mass., 98; Id., 200; 8 Id., 373; 9 Id., 221; 1 Gill & Johns., 248; 3 Conn., 70; 1 Bibb, 550; 2 M'Cord, 135. Although the *Massachusetts* statute regulating the prison-yard, at the time of making the decisions in that State above quoted, fixed the

liability of the escaping debtor and his sureties in double the amount of the debt for which he was imprisoned, yet those decisions were upon bonds held not to be valid within the statute, but binding at common law, and over which the Court had a right to exercise an equitable jurisdiction in determining the extent of the liability for a breach of the condition. These decisions turn upon the principle that the body of the debtor in execution is a pledge for the debt; and as that pledge is withdrawn by the escape, the creditor has a right to a judgment for that amount, with interest and costs.

5. Another position assumed by the appellants turns us back again to the replication. Among the causes of special demurrer to that branch of the pleading is, that it contains no averment of the existence of a judgment in favour of the plaintiffs against *Spader*. This point has already been settled by this Court in the case of *Martin et al. v. Kennard*, 3 Blackf., 430. This objection to the replication should have been sustained, and the Court erred in overruling it.

6. There is still another cause of demurrer to the replication assigned, and that is, that it concludes to the country, whereas it should conclude with a verification.

There have been more legal refinement and subtilty than good sense in settling the rules of pleading as to the [*200] *conclusion of replications, &c., and in applying those rules in a great variety of instances. But there is a class of cases not subject to this imputation, in which the appropriate form is well established. That class is, where the replication sets forth new matter, which the rejoinder may traverse without repeating the matter of the plea, or answer and avoid without a departure. The law is clearly settled that such replications must conclude with a verification. We think the replication in the record is of that character. The counsel for the appellees supposes it was necessary that the replication should contain a traverse of the plea of general performance, and, therefore, that notwithstanding the new matter which it contains, it should conclude to the country. In this we think he is mistaken. It was not necessary or proper to make the

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traverse: after the averment of the introductory matter, he should, at once, have assigned the breach; and, in so doing, he must necessarily have given an implied negative to the plea of performance. That course would have complied with all the forms which we have been able to find, and would also have been in conformity to the general principles laid down on the subject. He is also mistaken, in our apprehension, in supposing he can fortify himself behind the position that the defendant could not have taken issue on any part of the replication without repeating the substance of his plea, nor answer it with new matter without a departure. He could, certainly, have denied the allegation of the execution contained in the replication without a repetition of his plea; or he could, in various ways, have admitted the allegation and avoided it without a departure. The following authorities are decisive of the impropriety of the conclusion of the replication. 1 Saund. Rep., 103 *a*, n. 3; 2 Wils., 66; Douglass, 60; 2 Term Rep., 576; 2 Burr, 774; 1 Chitt. Pl., 616.

The demurrer to the replication was well taken, and the Court erred in overruling it.

7. We think the Court committed another error in sustaining the demurrer to the third plea, which is, that *Spader*, the debtor in execution, departed from the prison-bonds by the previous consent and license of the plaintiffs.

Whether a parol license is sufficient to destroy the effect of a covenant, or whether it can be such a waiver by one party to a specialty of something contracted to be done or [*201] not done by the other, as to excuse him from performance on his part, we do not determine. But there is another point of view in which this plea constitutes a bar to the action, and that is by showing matter which operates as a satisfaction and discharge of the judgment—of the debt itself, to secure which the prison-bonds-bond was executed. If a debtor, held in custody on execution, is set at liberty by the consent of his creditor, verbally given or otherwise, it is payment of the debt and a discharge of the judgment, so that neither an action of debt nor *scire facias* can afterwards be

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sustained, nor a new execution issue upon it. Satisfaction of the judgment is a good defense to an action on the bond, and a legal discharge from imprisonment under the judgment. It follows, therefore, of course, that the departure of *Spader* from the prison-bounds, by the consent of the plaintiffs, as set forth in the third plea, instead of constituting a breach of the condition of the bond, was only availing himself of that part of it which left him at liberty to go whenever he should "be discharged by law." Barnes, 205; 2 Mod., 136; 4 Burr., 2482; 1 B. & P., 242; 1 Salk., 271; 1 Term Rep., 557; 6 Id., 525; 7 Id., 416; 2 East, 243; 16 Johns., 181.

Various other objections to the proceedings of the Circuit Court were urged, which it is now unnecessary to notice, as they do not affect the merits of the cause, and may be easily obviated by attention to the future pleadings in the court below.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

A. S. White, for the appellants.

I. Naylor, for the appellees.

[*202] *THE GUAGA IRON COMPANY v. DAWSON.

FOREIGN CORPORATION—RIGHT TO SUE.—A corporation legally created in any one of the States may sue in the courts of this State (*a*).

SAME—NUL TIEL CORPORATION.—If the declaration aver that the plaintiffs are a corporation by virtue of a certain statute, a plea denying the existence of the statute is, in substance, a denial of the existence of the corporation (*b*).

ESTOPPEL.—A person sued by a corporation on a contract made with the plaintiffs as a corporation is not estopped from denying that the corporation existed at the time the suit was commenced. *Quære*, whether he is estopped from denying the existence of the corporation at the date of the contract (*c*).

(a) See cases cited in *Cicero, etc., Co. v. Craighead*, 28 Ind., 274.

(b) *Hubbard v. Chappel*, 14 Ind., 601.

(c) *Judah v. The American, etc., Co.*, 4 Ind., 333; *Morgan v. The Lawrenceburgh, etc., Co.*, 3 Ind., 285. See Davis' Digest; title, Estoppel.

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ERROR to the *Vermillion* Circuit Court.

BLACKFORD, J.—This was an action of *indebitatus assumpsit* brought by *The Guaga Iron Company* against *Joseph Dawson*, for goods sold and delivered.

[*203] *The declaration commences as follows: *The Guaga Iron Company* complains of *Joseph Dawson, &c.* For that whereas the said plaintiffs, by an act of the legislature of the State of *Ohio*, were incorporated and made a body politic and corporate in law, by the name and title of *The Guaga Iron Company*, with powers, &c. The defendant pleaded four pleas, but the decision of this case only requires us to notice the third one. The defendant, in that plea, says, *actio non*, because he says that there is no such record or act of the legislature of the State of *Ohio*, as is alleged in the declaration. The plea was demurred to for the following causes: First, The matter, if pleadable, can only be pleaded in abatement; Secondly, The plea tenders an immaterial issue; Thirdly, The plea amounts to the general issue. The Court overruled the demurrer, and gave judgment for the defendant.

Before we examine the errors assigned in the record, it is necessary to dispose of an objection to the action raised in the argument by the defendant. He contends that the plaintiffs are a foreign corporation as the declaration shows and that, therefore, though the defence be ever so objectionable, they have no right to recover. There is no difficulty on this point. A corporation legally created in any one of the States, may sue in the Courts of any other State. 2 Kent's Comm., 284; *The Silver Lake Bank v. North*, 4 Johns. Ch. Rep., 370.

This preliminary question being thus disposed of, it becomes necessary to examine the validity of the objections made by the plaintiffs to the plea; and to do that, the character of the plea must first be ascertained. The plaintiffs aver in the declaration, that they are a corporation, by virtue of a statute of the State of *Ohio*. They rely, therefore, on that statute for their authority to sue in the name of *The Guaga Iron Company*. If there is no such statute, the plaintiffs, by their own showing, have no existence; and the plea denying the existence of that

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statute must, in substance, be a denial of the existence of the corporation. We shall, consequently, consider the objections made to the plea, as if they were made to a plea of *nul tiel corporation*.

The first cause of demurrer assigned is, that the matter of the plea can only be pleaded in abatement. Were this a plea of misnomer, the objection would be valid; but that is not the nature of the plea. It is not, that the plaintiffs have [*204] *a different name by which they should have sued; but it is, that they have no existence, and, of course, that they have no cause of action. In *Viner's Abridgment*, the law is stated in the following language: "In an action by a corporation or natural body, misnomer of the one or the other goes but to the writ, but to say that no such person *in rerum natura*, or no such body politic, this is in bar; for if he be misnamed, he may have a new writ by the right name; but if there be no such body politic, or such person, then he can not have an action." 6 *Viner's Abr.*, 308. The same doctrine is found in *Kyd on Corporations*, Vol. 1, p. 284, and in the case of *The Mayor and Burgesses of Stafford v. Bolton*, 1 Bos. & Pull., 40. These authorities clearly show, that the plaintiffs' objection to this plea, merely because it is not a plea in abatement, can not be sustained.

The second cause of demurrer assigned is, that the plea tenders an immaterial issue. What has been already said is a sufficient answer to this objection. If there was no such act of incorporation as the plaintiffs rely on to show their existence, they have no cause of action against the defendant. Whether there was such an act or not, is the question raised by the plea. The issue tendered, therefore, is material.

The third objection to the plea is, that it amounts to the general issue. In support of this objection, the plaintiffs refer us to the case of *The Bank of Auburn v. Weed & Aiken*, 19 Johns. Rep., 300. That case, it is true, is directly in the plaintiffs' favour; and there is also a subsequent one to the same effect. *The Farmers' and Mechanics' Bank v. Rayner*, 2 Hall's Rep., 195. These cases both decide, that a plea of *nul*

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tiel corporation is bad, because it amounts to the general issue. It is, however, to be observed, that such a special plea in bar, denying the existence of the corporation, is recognized as a valid plea in many books of good authority. 6 Viner's Abr., 315; 1 Saund. Rep., 340, note (2); 1 Kyd on Corp., 284.

There is, also, a late decision of the Supreme Court of the *United States*, in direct opposition to the cause of demurrer under consideration. In that suit, which was brought by a foreign corporation, the defendant pleaded the general issue. The Court decided, after argument on the point, that the plea was an admission of the existence of the corporation, and of its capacity to sue. The following is the language [*205] of the *Court: "It is material to observe that no plea in abatement has been filed, denying the capacity of the plaintiffs to sue; and no special plea in abatement, or bar, that there is no such corporation as stated in the writ. The general issue is pleaded, which admits the competency of the plaintiffs to sue in the corporate capacity in which they have sued. If the defendants meant to have insisted upon the want of a corporate capacity in the plaintiffs to sue, it should have been insisted upon by a special plea in abatement or bar. Pleading to the merits has been held by the Court, to be an admission of the capacity of the plaintiffs to sue." *The Society for the Propagation of the Gospel, &c. v. The Town of Pawlet*, 4 Peters, 480, 501. The case last cited is in direct opposition to the two decisions in *New York* which we have already mentioned. It decides, that the existence of the corporation may be denied by a special plea, and that it cannot be denied in any other manner. We do not consider the point a very clear one, but the weight of authority is in favour of permitting the defendant to deny the existence of the corporation by a special plea in bar. The third objection to the plea is accordingly overruled.

The plaintiffs contend, that the defendant is estopped by his contract with them as declared on, from denying the existence of the corporation. There is no ground for this objection to the plea. If any estoppel arises in consequence of the alleged

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contract, as to which we give no opinion, it could only prevent the defendant from denying that the corporation, at the date of the contract, was in existence. The plea in question does not contain any such denial. In denying the existence of the corporation, the plea refers to a time subsequent to that when the contract was made. There is no inconsistency, therefore, between the alleged admission of the existence of the corporation at the date of the contract, and the denial of its existence at the subsequent period to which the plea relates. The objection to the plea, therefore, founded on the doctrine of estoppels, has no application to the present case.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

A. S. White and S. B. Gookins, for the plaintiffs.

T. A. Howard and J. Whitcomb, for the defendant.

[*206] *BARNETT and Another v. SPENCER.

PROMISSORY NOTE—ASSIGNMENT OF BALANCE.—An assignment on a sealed note of the balance due (part having been paid and the payment indorsed), was held good.

SAME—FRAUDULENT CONSIDERATION.—A sealed note given to an agent by the claimant of a tract of land, in consideration of the payee's agreement to abandon the prosecution of a claim to the land, which he had undertaken to prosecute for his principal, is fraudulent and void.

ERROR to the *Allen* Circuit Court.

DEWEY, J.—Debt by *Spencer*, assignee of *Harris*, against *Barnett* and *Hanna*. The declaration states that the defendants, *James Barnett* and *Samuel Hanna* (the plaintiffs in error), on, &c., claimed an undivided moiety of a certain tract of land, which they had purchased of one *Taylor*, who had a claim of title to it under the pre-emption laws of the *United States*; that they and *Taylor* were in possession of the land as tenants in common; that one *Gibo* before, and at the same time, also claimed the same land by virtue of title in him

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under the same laws, having a superior and better title than *Taylor*; that *Gibo*, for and in consideration that one *Harris* had undertaken to use his influence to have his title to the land confirmed, on, &c., executed his power of attorney to *Harris*, authorizing and empowering him to act as the agent and attorney of *Gibo* to obtain a confirmation of his title; which power of attorney was lost; that at the same time the power of attorney was executed, *Gibo* also made his obligation to *Harris* and bound himself in the penalty of \$5,000 to convey to *Harris* a moiety of one-third of the land, provided the title to the same should be decided to be in *Gibo*; which obligation was also lost; that afterwards, on, &c., the defendants, in consideration of the agreement of *Harris* to prosecute the claim of *Gibo* to the land no further, executed to [*207] him their writing *obligatory and thereby promised to pay him \$400 in three months, for value received; that afterwards, on, &c., the defendants paid *Harris* \$155.01, which was credited on the writing obligatory; and that afterwards *Harris*, by endorsement on the writing obligatory by him subscribed, assigned the sum of \$244.99, it being the amount unpaid to the plaintiff; whereby an action, &c.; concluding in proper form. The defendant demurred generally. Judgment for the plaintiff.

An objection is made to the legality of the assignment of the cause of action by *Harris* to the plaintiff, on the ground that only a part of the contract is attempted to be assigned. This objection is not well taken. The assignment is of the whole sum due on the contract, and is in effect a transfer of the contract itself. *Harris* parted with all his interest in it.

The demurrer, however, should have been sustained. The declaration shows that the consideration of the contract on which it is founded, is deeply tainted with fraud, at least on the part of *Harris*, the payee of the note. He had for a good consideration, and being clothed with full power from *Gibo*, undertaken to lend his aid in procuring the confirmation of the title of the latter to a certain tract of land, of which the plaintiffs in error and their co-tenant *Taylor* under a claim of

title held possession. But upon his agreement to prosecute *Gibo's* claim no further, he received from the plaintiffs in error their note for \$400, which he assigned to *Spencer*, the defendant in error. In attempting to enforce the payment of this demand, *Spencer* can stand in no better situation than his assignor.

"It is extremely difficult to advance any general principle or elementary doctrine upon the subject of fraud," so various are the forms which it assumes. But it may safely be said that no claim founded in bad faith, in moral turpitude, in deception upon the public, or a third person, or in fraud practiced by one contracting party on the other, can constitute a good cause of action; and that whenever such a claim makes its appearance in a court of justice, the law, ever watchful of public morals and private right, is sure to defeat the dishonest scheme, either by exerting its power or withholding its aid.

The objection to the validity of the contract under consideration is, that it was the price of the treachery of [*208] *Harris* to his *principal, *Gibo*. He had no right to contract to be unfaithful to him. It is no answer to this view of the subject to say, that the withdrawal of *Harris* from the interest of *Gibo*, could not impair the claim of the latter to the land. It deprived him of the services of his agent, and may well be supposed to have embarrassed and delayed him in the prosecution of his rights. Besides, where fraud is imputed, the question is not—whether it has been successful, but whether it exists. Instances may be found in which contracts have been held to be void as being fraudulent upon third persons, when no injury was in fact done them. 3 Term Rep., 551; 4 Moore, 78. But admit that the conduct of *Harris* took nothing whatever from *Gibo*, of course, it could convey nothing to *Barnett* and *Hanna*: it would then follow that instead of a fraudulent consideration, the contract had no consideration at all, and that it is void for that reason. We view it, however, in the former light, and hold that as a contract executed in consideration of the faithlessness of an agent to his principal, it is fraudulent and void.

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The foregoing and following authorities clearly show that the case presented by the record, belongs to that class of contracts which have been decided to be invalid as frauds upon third persons. 1 Com. on Cont., 37, 38; Chitt. on Cont., 214, 222 to 227; 2 Term Rep., 763; 4 Id., 166; 4 B. & C., 319; 3 Id., 605; 4 Esp. R., 179 (1).

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. W. Ewing and J. S. Newman, for the plaintiffs.

H. Cooper, for the defendant.

(1) There was another point decided in this case, but as it has been since overruled, it is not here noticed.

ARMSTRONG and Others v. THE BOARD OF COMMISSIONERS OF DEARBORN COUNTY.

RE-LOCATION OF COUNTY SEAT—RIGHTS OF DONORS IN AID OF.—By a statute of 1827, commissioners were appointed to re-locate the seat of justice for *Dearborn* county, and were authorized to receive donations, &c.

The statute provided, that as soon as the public buildings were [*209] completed *at the designated place, that place should *forever* thereafter be the permanent seat of justice of the county. The commissioners fixed the seat of justice at *Lawrenceburgh*; receiving from certain persons as a donation, an obligation conditioned for building a court house there of a certain description. The court-house was accordingly built by the donors conformably to their contract, the expense of which was \$2,500.

SAME.—By a statute of 1835, commissioners were again appointed to re-locate the seat of justice of the same county; but the statute made no provision in case the seat of justice should be removed from *Lawrenceburgh*, for the re-payment to the donors of the money they had expended in building the court-house. These commissioners fixed the seat of justice at *Wilmington*.

Held, that the statute of 1835, under the authority of which the seat of justice was removed to *Wilmington*, was not unconstitutional; and that the removal could not be objected to by the persons who built the court-house at *Lawrenceburgh*, merely because they had not been repaid the expense of building it.

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APPEAL from the *Dearborn* Circuit Court.

M'KINNEY, J.—This is a petition filed by the board of commissioners of the county of *Dearborn* in the Circuit Court of that county.

The commissioners in substance state, that by an act of the General Assembly of the State, entitled “An act providing for the re-location of the seat of justice in the county of *Dearborn* and for other purposes,” passed in the year 1835, certain commissioners were appointed to re-locate the seat of justice of *Dearborn* county; that a majority of the commissioners so appointed met at the time and place designated in the act, and being sworn, &c., after having viewed the different sites, &c., adjourned until the 18th of *May*, 1835; that on that day they again convened, and proceeded from said 18th of *May* until the 20th of said month, to consider sites at or near the center of said county of *Dearborn*, and all other situations and sites offered for their consideration, and having also taken into view and paid due regard to the present and probable future population of said county, and a more suitable situation and convenient site in the opinion of said commissioners for the seat of justice in said county not being found, they, the commissioners, did then and there re-locate the seat of justice for said county on the land, &c., adjoining the town of *Wilmington* in said county, to-wit, on, &c.; that the said commissioners did on said 20th of *May*, agreeably to the provisions of the said act of the General Assembly, certify

their proceedings and re-location under their hands
[*210] and seals to the *recorder of said county, which,

together with other papers filed by the commissioners, have been recorded by the recorder of said county; that afterwards, to wit, on the 9th of *September*, 1835, the board of commissioners of *Dearborn* county were advised of the proceedings, report, and recording of the report of said commissioners, appointed, &c.; that the board of commissioners of said county did enter the same on their record, and did afterwards in the said month of *September*, order and appoint *Stephen Woods*, &c., commissioners to superintend the erection

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and completion of a court house and jail, on the site of the seat of justice designated in the report aforesaid of the commissioners appointed by the act, &c.; that the commissioners appointed to superintend the erection of the public buildings were residents and freeholders of the county, and before entering upon the duties assigned gave bond, &c., approved, &c.; that the buildings were erected, agreeably to the order of the board of commissioners, and being so erected and completed were, on the 11th of *March*, 1836, examined and received by the board of commissioners of said county, and the commissioners appointed to superintend, &c., and their sureties discharged, &c. The petition concludes, by moving the Circuit Court to adjourn to the court house in *Wilmington*, and that it make such other and further order, &c.

Walter Armstrong and others, the appellants, entered their appearance as defendants to said motion, and pleaded *actio non*, because they say, that by the provisions of an act of the General Assembly of this State, approved 26th *January*, 1827, entitled "An act for the re-location of the seat of justice in the county of *Dearborn*," certain commissioners were appointed to re-locate the seat of justice of said county; that the said commissioners were authorized to receive donations to erect the necessary public buildings at the site they should select as such seat of justice, and to take the necessary bonds and deeds from the donors so as to enforce the contracts. They aver that a majority of said commissioners did agreeably to said act meet, &c., on, &c., and after taking the oath, &c., proceed to the discharge of their duties, and did on, &c., finally and permanently establish the seat of justice of said county in the old town of *Lawrenceburgh*, where the court house now stands; that the commissioners did then and there in writing, &c., certify to the recorder of said county, to be [*211] by him *recorded, that they had, agreeably to the provisions of said act, met as aforesaid, on, &c., at, &c., and having been duly sworn, had, from day to day, proceeded until the said day, &c., to view the different sites near the centre of said county, and all other situations and sites

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offered for their consideration, and had also taken into view and paid due regard to the present and future population of said county, and that, in their opinion, they could not select a site more convenient for the said county of *Dearborn* than the old town of *Lawrenceburgh*, on section, &c., and that the seat of justice was permanently located there. They aver that before said commissioners had finally relocated said seat of justice, to wit, on, &c., they, with, &c., proposed to the said commissioners that they would pay and furnish at their own proper costs, charges and expense, money to build a court house for said county, equal in value and convenience to the court house in the county of *Franklin*, &c., if they, the said commissioners, under the said act, would make the said town of *Lawrenceburgh*, forever, the permanent seat of justice of said county, and that they would pay the money in installments as follows, &c.; that the commissioners accepted said proposition, and contracted with them, the said *Armstrong*, &c., that they would relocate said seat of justice in the town of *Lawrenceburgh* if they would pay, &c.; that the said *Armstrong*, &c., in consideration thereof, made their bond payable to the board doing county business, that they would pay the money to erect the proper court house, &c., and that the said commissioners did, therefore, permanently locate said seat of justice in said town, &c. They aver that they did pay and furnish a sufficient sum of money to erect said court house, of the value and convenience of the court house in *Franklin* county; that the said court house was accordingly, in due time, properly erected and finished, and was and is of equal value, &c., to that in *Franklin* county, and that they paid a large sum of money, to-wit, \$2,500, for the erection and completion of the same. They further aver that, by the provisions of said act, the said seat of justice was forever permanently located and fixed in the said town of *Lawrenceburgh*, where the court house was finished in manner aforesaid, and where all courts were to be forever thereafter held, and that the seat of justice has ever since been there located, &c. They aver that they have a vested

[*212] interest in the said seat of *justice remaining forever

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fixed where it now is, to-wit, at the town of *Lawrenceburgh*, they having, for a valuable consideration in manner and form aforesaid, purchased that interest by the payment of the sum of \$2,500, and that it can not be removed, or the sittings of the court adjourned from thence, until they are paid and satisfied the said sum of money so expended. They aver that the said sum of \$2,500 has not been paid to them, nor any part thereof; that there is no provision in the statute under which this motion is made for their payment or indemnity, and that therefore the seat of justice can not legally be moved from, nor the court legally adjourned to any other place than the said court house in said town of *Lawrenceburgh*, &c.

There was a general demurrer to this plea, and a judgment sustaining the demurrer. To reverse that judgment this appeal is prosecuted.

Together with this case, a bill in chancery praying an injunction, and filed by the appellants in the case just stated, against the appellees and others, is also submitted. The injunction was refused, and the bill on demurrer dismissed for the want of equity. The matters charged in the bill as the ground for the injunction, and for relief, are the same used in the plea to the petition. The opinion we pronounce will be decisive of each case.

In these cases there are presented to our consideration several important questions, which justly demand and have received the most careful and deliberate attention. Although we regard the questions before us to be important, we are of opinion that an application of established principles to the facts disclosed, strips them of a difficulty in their settlement, with which, by the ingenious and elaborate arguments of counsel, they have been clothed. Before we proceed to the examination of the positions taken by the appellants to reverse the judgments of the Circuit Court, we will recur to some principles inseparably connected with a correct view of these cases, and then notice the two acts of the General Assembly of the State, supposed to be in conflict with each other.

The principal question before us involves the rightful

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exercise, by the Legislature, of the power to locate the seat of justice of a county. That power is not denied; indeed, it can not be denied; but it is contended that it has been so [*213] exercised in **Dearborn* county as to create a contract, by which certain interests have acquired a vested character, and therefore no change of the seat of justice can afterwards be made which would divest those interests, without impairing the obligation of a contract. As the power of the Legislature to establish seats of justice in the several counties is conceded, that power must be founded upon the general right appertaining to that body, to promote the interests and convenience of the people. Our counties are all incorporated. They are public corporations, created for public political purposes; and the whole interest in them belongs to the public. The Legislature have, therefore, in the language of *Kent*, "under proper limitations, the right to change, modify, enlarge, or restrain them; securing, however, the property for the uses of those for whom it was purchased." He further says, "a public corporation, instituted for purposes connected with the administration of the government, may be controlled by the Legislature, because such a corporation is not a contract within the purview of the constitution of the *United States*." This is also the doctrine laid down by *Story*. 2 *Kent's Comm.*, 245; 3 *Story's Comm.*, 260. A county, then, being a public corporation, instituted for purposes connected with the administration of the government, is properly the subject of control by the Legislature. With us, the exercise of this power in changing and altering the bounds of counties, either adding to or taking from them territory, and in re-locating seats of justice, is frequent. The right of exercising this power has never been questioned. It is a power incident to sovereignty, and secured by the constitution.

The re-location of a seat of justice in a county, when demanded by the people of such county, with a view to the advancement of public interests and convenience, is a duty from which a Legislature could not shrink. If after the location of a seat of justice, and its continuance for many years,

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individual interests should become identified in its permanency, but these be opposed by the paramount interests and convenience of the public, and a re-location be made, what is the situation of such individual interests, if deteriorated and affected in value by such re-location? Is the public bound to repair losses and afford indemnity? This question can only be answered in the negative. Such losses would be [*214] consequential *upon the exercise of a public right.

They are in the class of cases to which the maxim "*damnum sine injuria*" applies. Such losses are frequently sustained, when from public convenience and necessity a change of a road, a canal, or a railroad may be demanded and made. The lesser interests, those of individuals, must yield when in conflict with the greater, those of the public. The building of a town or a village may have been superinduced by positive advantages, afforded by a location on a canal, yet, if public convenience and necessity and the interests of the State demand a change, that change can certainly be made without liability to indemnity, however fatal and disastrous it may prove to the interests of individuals.

With these remarks upon the power of the Legislature over public corporations such as counties, we will proceed to the examination of the two acts of the Legislature which are brought before us. As the act of 1827 is that on which the appellants base their claim, we will precede its examination by a general and indisputable proposition, which is, that if the act itself did not create a contract with the appellants, or empower the commissioners appointed by it to enter into such contract, in locating the seat of justice, and such contract was entered into, the commissioners transcended their powers and the contract is invalid. We shall cite such portions of the act as may seem applicable to the question of contract.

The first section appoints the commissioners and thus defines their duties—"To locate said seat of justice for said county, as near the centre thereof as the situation of the land and the interests of the county will admit, having due regard to the present and probable future population thereof: provided, said

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commissioners shall have the right to view every other site equally near the geographical centre with *Lawrenceburgh*, the centre inclusive, and fix on the site most eligible within said bounds; and if the commissioners can not select a site more convenient for the county, the seat shall be and remain at the town of *Lawrenceburgh*." In this provision, there is no authority given to the commissioners to make the location dependent on a contract, nor are they authorized to make a contract. The authority to locate the seat of justice is specific, and only controlled by a discretion limited to the situation of the land, the interests of the county with reference to [*215] *the present and probable future population, and to the eligibility and convenience of the various sites within the bounds prescribed. The continuance of the seat of justice at *Lawrenceburgh*, depended on the contingency that the commissioners could not select a site more convenient for the county.

If such be the extent of the authority given to the commissioners, it is palpable that they could not make the location the subject of contract. If a contract had been intended by the act, we may well presume that language expressive of that intention would have been used. But it would be an insult to the Legislature to suppose that such an intention was entertained. We can not indulge the idea, that in a question of such moment as the public interest and convenience of the people of that county in the place in which the Circuit Court the Probate Court, and the sessions of the board doing county business are to be holden, and all business affecting the great interests of a county is to be transacted, the Legislature could commit such interests to the arbitrament of dollars and cents. Such a conclusion would presume that body unfaithful to the trust confided to it by the constitution.

We think it can not be seriously contended that a contract is created, or authority to contract for the location of the seat of justice given, by the second section. That simply empowers the commissioners to receive all donations of land for the site of said seat of justice, and all donations which may be made

to defray the expense of erecting the necessary public buildings for the use of said county, and to take all necessary public bonds and deeds to secure the faithful performance of such contracts. The commissioners are to receive all donations of land, &c., for the site of said seat of justice, &c. This language is plain and unambiguous, and the true interpretation of the section will be perhaps correctly reached by answers to a question it presents. At what time prior or subsequent to the location, are these donations contemplated to be made? Undoubtedly after the location; for until that was made, the commissioners had no authority to accept or receive donations. To what purposes were these donations to be applied? The section itself furnishes the answer—that of land, for the site of said seat of justice, and those of money, &c., to defray the expense of erecting the necessary public buildings for the use of said county. Had the location depended on donations, [*216] their *extent and liberality, without regard to the intention of the legislature as shown in the first section, and there confined to the situation of the land, interests and convenience of the people, would perhaps have determined the site. In support of this view of the section, we will suppose that no donation had been offered. Were the powers of the commissioners thereby arrested and the act of the Legislature a nullity? Surely not. Such a conclusion would be repugnant to the act itself, and to all the principles to which we have adverted. The commissioners performing their duties, must have located the seat of justice; and the only consequence of the refusal of individuals to donate either land or money, would have been that the county of *Dearborn*, to erect the necessary public buildings, &c., must have resorted to taxation. The distinction between a contract and a donation is too obvious to require exposition. This distinction was acted upon by the Legislature.

It would thus seem that the commissioners were not authorized to enter into a contract, nor were they authorized to make the location of the seat of justice dependent on donations. If, however, they did enter into a contract, which is not shown

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it is clear that the appellants, having a perfect knowledge from the act of the powers of the commissioners, could not, if those powers were exceeded, avail themselves of a supposed benefit or right arising from an act by the commissioners, itself an evident excess of the powers committed to them. The fund commissioners are authorized to borrow money, and the maximum amount of interest they are to give is fixed. The act appointing the commissioners and defining their duties, is submitted to those from whom they wish to obtain loans, and is itself, in the event of a contract, a part of the contract. If these commissioners should contract for a loan at six *per cent.*, when the act only authorizes them to give five *per cent.*, no one would contend that the contract at six *per cent.* was obligatory upon the State. This case is directly parallel to that before us.

There remains to be noticed but one other provision of the act under review. This is found in the sixth section, and thus reads: "So soon as the public buildings shall be completed in the manner aforesaid, at the place so designated, the same shall be *forever* thereafter the permanent seat of justice of said county of *Dearborn*," &c. Argument touching this [*217] provision *is rendered unnecessary by an admission of the appellants, that a subsequent Legislature is not concluded by the word *forever* here used. The admission is qualified by the suggestion, that if a change be made, the act authorizing it must provide an indemnity to the appellants, who, it is contended, have vested rights based upon contract. This question has been discussed, and may hereafter receive additional notice.

We are now arrived, pursuing the course indicated, to the consideration of the appellants' positions. The first is, that the act of 1835 is unconstitutional, being repugnant to the constitution of the *United States*, as it impairs the obligation of a contract.

This position is attempted to be sustained by urging that the act of 1827, and the proceedings under it, are a contract within the meaning of the constitution. Although it seems to have been once doubted whether grants and contracts by a State,

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created directly by law, or made by some authorized agent in pursuance of a law, come within the prohibition of the constitution, yet it is settled that they are as much so as the contracts and grants of private persons; and the only question, in order to the operation of the constitutional prohibition, is, do such grants or contracts exist? 3 Story's Comm., 257; 1 Kent's Comm., 388; *Fletcher v. Peck*, 6 Cranch., 87. These authorities likewise establish, that where a law creates a contract, and absolute rights are vested under it, such rights can not be divested by a repeal of that law. The judicial expositions have, however, confined the prohibition to contracts which respect property or some other object of value, and which confer rights capable of being asserted in a Court of justice; leaving the several States untrammelled in the exercise of sovereign power, in regulating their civil institutions adopted for internal government. See the above-cited authorities. *Dartmouth College v. Woodward*, 4 Wheat. Rep., 518, 629. Mr. Justice Story, treating of this distinction says, "The reason is, that it is only a mode of exercising public rights and public powers for the promotion of the general interest; and therefore it must, from its very nature, remain subject to the legislative will, so always, that private rights are not infringed or trespassed upon." 3 Story's Comm., 361. The law thus presented is in entire accordance with that noticed in the remarks prefatory to the examination of the act of [*218] 1827; and it is *obvious, that if the appellants can show that they have rights capable of being asserted in a Court of justice, or that a contract which affected their property has been violated, they are entitled to protection.

From the construction we have given to the act of 1827, and from the conclusion to which we have come, that the act did not create a contract, nor authorize one by the agents of the State, for the location of the seat of justice, it would seem unnecessary to pursue further the investigation of the appellants' first position. As it is, however, pressed with much zeal, and sustained at least by ingenious argument, it may demand a few additional remarks.

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If the location *forever* of the seat of justice at *Lawrenceburgh*, in consideration of the appellants erecting the Court house, is not a contract, it is urged that it is a grant, and that the constitution protects all grants, franchises, immunities, &c. The latter conclusion may be conceded; but, from it, it does not necessarily follow that the appellants have had granted to them a franchise, immunity or any right capable of being asserted in a Court of justice. It does not follow, because certain rights are protected by the constitution, that they are invested with them. This Court will never hesitate, when rights are shown to exist and are before it for protection, to extend that protection. We can not, however, pass beyond the case before us, presume rights, and then afford protection. Now it is said the appellants have a right capable of being asserted in a Court of justice. What is that right? It is called a franchise. What is a franchise? They say, from the books, it is "a right to have a fair or a market holden at a certain time and a certain place," &c. Franchises are not only enjoyed in the instance presented, but exist in many other ways. The law regards them as valuable rights, and they can not be invaded by legislative enactments. 3 Story's Comm., 260. Let us inquire to what the right or franchise claimed by the appellants attaches. To the seat of justice of the county of *Dearborn* and its records. If the claim be available, it clothes the appellants with the power of controlling the general policy of the State, the rights of the people of that county, and the administration of justice in it. The State itself is stripped of one of the inherent and essential attributes of sovereignty. It is compelled, however imposing its

[*219] obligation, *however, changed from the present may be the future aspect of things in that county, however general and unanimous may be the demand of the people for a change of the seat of justice, required equally by their convenience, necessities, and interests, to silence all in the recognition of a principle, not only incompatible with the spirit of the constitution, but alien to the institutions of a free people. Such a claim can not be supported.

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We will now take up the second position. The act of 1835 is said to be unconstitutional, because it is in conflict with the 7th sect. 1st art. of the constitution of this State. That section declares "that no man's particular services shall be demanded, or property taken or applied to public use, without the consent, &c., or without a just compensation being made therefor."

It is readily admitted, that if the legislature should take or apply the property of a citizen to public use, it must make a just compensation for it, and that the act which authorizes the taking or application, should provide for the compensation. This has been done here; it is believed to be done in every State of the Union; and is the admitted law of *England*, when the appropriation of private property has been necessary to the public interest. But as the appellants, as seen, have had no private property taken, &c., we can not discover how this provision of the constitution has been violated. If the appellants have suffered a loss by the change of the seat of justice, such loss, as previously remarked, is consequential, and clearly not the subject of compensation under the constitutional provision cited. This is the proper construction of the constitution, and the only one of which it is susceptible. *Callender v. Marsh*, 1 Pick. R., 430.

We are therefore of opinion that the Circuit Court decided correctly, in sustaining the demurrer to the plea of the appellants, as well as in sustaining the demurrer to the bill in chancery, and in refusing the injunction (1).

DEWEY, J., having been of counsel in the cause, was absent.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

J. Sullivan, S. C. Stevens and G. H. Dunn, for the appellants.

[*220] **J. G. Marshall, D. Kelso and W. Quarles*, for the appellees.

(1) Vide *Elwell v. Tucker*, Vol. 1 of these Rep., 285; *Blackwell v. The Board of Justices of L. County*, 2 Id., 143.

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Ex parte KNIGHT, in Error.

HELD, that the record of a judgment by confession, rendered by a justice of the peace in 1833, should show that an oath relative to the fairness of the proceedings, as prescribed by the statute of 1831, was taken by the defendant, or the judgment is of no validity. Rev. Code, 1831, p. 298; *M'Fadin v. Gill*, Nov. term, 1824. See 5 Ind., 107.

COPPOCK v. BURKHART.

CONDITION PRECEDENT.—If the payee of a promissory note refuse to comply with the condition upon which the note was made payable to him, he can not sustain a suit against the maker on the note.

ERROR to the *Marion* Circuit Court.

BLACKFORD, J.—Debt by *Burkhart* against *Coppock*, before a justice of the peace on a promissory note. Pleas, *nil debet*, and a failure of consideration. Judgment by the justice for the defendant. The plaintiff appealed to the Circuit Court. Judgment by the Circuit Court, without a jury, for the plaintiff.

The facts are these: *Burkhart* sold *Day* a lot of ground in *Indianapolis*, and gave him a title-bond, conditioned for a conveyance of the lot when the purchase-money should be paid; and *Day* gave his notes to *Burkhart* for the purchase-money. After this, the defendant bought the lot of [*221] *Day*, and *took from him an assignment of the title-bond. As the price of the lot, the defendant agreed to pay off the notes given by *Day* to *Burkhart*; and to effect that purpose he executed his notes for the price of the lot, and made them payable to *Burkhart*. *Day* took the notes thus given by the defendant and offered them to *Burkhart*, but

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Burkhart refused to receive them in exchange for *Day's* notes. *Day* then, without the defendant's knowledge or consent, purchased a horse of *Burkhart*, and gave him the defendant's notes in payment. Subsequently to these transactions, the defendant paid *Burkhart* for the lot, took up *Day's* notes, and received, by *Burkhart's* authority, a deed for the lot.

Burkhart now sues the defendant on one of the notes executed by him under the circumstances which we have just mentioned.

It appears to us that the plaintiff has no right to recover in this action. The record shows that there was a precedent condition to be performed by him before he could be entitled to the defendant's notes. The condition was, that the plaintiff should give up *Day's* notes in exchange for the defendant's, and hold the defendant's notes for the purchase-money of the lot. With this condition the plaintiff refused to comply, and compelled the defendant, before he would procure him a deed for the lot, to pay off *Day's* notes in cash. It is evident that the consideration which induced the defendant to execute his notes was, that the payee should deliver up *Day's* notes. The consideration was an executory one, and the payee has refused to perform it. Under these circumstances there is a total failure of the consideration for which the notes were given, and this suit, which is founded on one of them, can not be supported. The defendant has already paid the plaintiff once for the lot, and he must pay him for it a second time, if the plaintiff can recover on the notes in question. That can not be the legal effect of the defendant's contract.

The circumstance that *Day* exceeded his authority, and delivered the defendant's notes to the plaintiff in payment for a horse, is of no consequence to the defendant. That is a matter to be settled between the plaintiff and *Day*.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

[*222] **J. Morrison*, for the plaintiff.

W. Quarles, for the defendant.

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M'KEE v. MILLER and Another.

CONTRACT, PART PERFORMANCE OF.—*A* and *B* entered into a written agreement, by which *A* was to purchase 1,500 hogs, and deliver them to *B* at a particular time and place, and at a specified price. The money necessary to buy the hogs was to be advanced by *B*. At the date of the contract, and in part performance of it, *B* advanced to *A* \$300, and *A* gave to *B* a promissory note for the amount, as an evidence merely of the receipt of the money. In consequence of the fault of *B* in not afterwards advancing, according to his agreement, the residue of the money necessary for the purchase, *A* was prevented from complying with his part of the contract.

Held, that a suit would not lie on the note for the want of consideration.

Held, also, that *B* could not under these circumstances recover the money advanced to *A* in an action for money had and received, nor sustain an action against him on the special contract (*a*).

ERROR to the *Union* Circuit Court.

BLACKFORD, J.—This was an action of debt, brought by *Miller* and *Lee* against *M'Kee*, on a promissory note. The declaration shows that the note was given by the defendant to the plaintiffs, at *Cincinnati*, on the 28th of *October*, 1835, for the sum of \$300, and was payable on the 6th of *December* following. To this action the defendant pleaded three special pleas in bar. There was a general demurrer to the pleas, and a judgment for the plaintiffs.

The first plea is obviously bad, and we shall take no further notice of it.

The third plea is as follows: The defendant says *actio non*, because he says that on the 28th of *October*, 1835, the parties entered into a written agreement, by which the defendant was to deliver to the plaintiffs, in *Cincinnati*, by the 6th of *December*, in the same year, 1,500 hogs; that the defendant was to be paid for the hogs the prices which should be current at *Cincinnati* on the 18th of *November*, 1835; that to enable the defendant to buy the hogs of the farmers in the country, the plaintiffs advanced to him, at the time of the contract, the sum of \$300, evidenced by the defendant's note of

(2: See *Pitts v. Pitts*, 21 Ind., 309.)

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[*223] the *same date, and agreed to deliver to him at *Liberty*, in this State, by the 20th of *November*, 1835, the residue of the money necessary for the purchase, and that he should be paid, on a final settlement, the balance due him. The plea then avers that the note was given for no other cause than that mentioned in the agreement; that the plaintiffs neither did nor would deliver to the defendant, according to the agreement, the said residue of the money to buy the hogs; that the defendant, before the 20th of *November*, 1835, expended the money specified in the note, in securing in part payment the hogs for the plaintiffs, but that on account of the plaintiffs' neglect and refusal to furnish the said residue of the money, he was compelled to abandon his contracts for the hogs, and could not fulfill his part of the agreement. Wherefore, &c.

The facts contained in this plea show that the note upon which alone the suit is founded, was given without any valid consideration. The plaintiffs advanced the money to the defendant in part performance of a special contract; and the money was to be accounted for by him on a future settlement of the business contemplated by the contract. The note was not given in consideration of any benefit received by the defendant, nor of any injury sustained, at his instance, by the plaintiffs. It was executed merely as an evidence of the defendant's receipt of the money, for the purpose to which we have referred; and that is shown by the express language of the agreement which is copied into the plea. The cause, therefore, for which the note was given, is not sufficient to support the promise contained in it. We are of opinion, for these reasons, that the third plea in this case is a bar to the action.

The second plea is similar to the third one and is also valid.

If the plaintiffs have a right of action against the defendant, in consequence of his breach of the agreement under which he received the money in question, their redress must be sought by some other action than the present one, which is founded solely on the note. If the defendant, after the receipt of the \$300, had improperly refused to proceed any further in the business, his default might have authorized the plaintiffs to consider

the agreement as rescinded. In that case the plaintiffs would have had a right to recover the money advanced to the defendant, by an action against him for money had and received.

Giles et al. v. Edwards, 7 Term Rep., 177. But to [*224] *enable the plaintiffs to pursue that remedy, they must have a very different case from the one exhibited by the record before us. If the defendant's non-performance of his part of the agreement was entirely owing to the fault of the plaintiffs, they can not support an action for the money which they advanced to him under that agreement. This doctrine is proved by the following case :

Evertson entered into a written agreement with *Ketchum* and *Sweet*, by which he agreed to sell them a certain tract of land for \$6,000. A part of the purchase-money, viz., \$700, was to be paid within a few months after the date of the agreement, and the residue in three annual installments. The deed was to be executed on the payment of the \$700. At the time appointed the \$700 were paid, and the vendor deposited the deed at the time and place designated by the agreement. The purchasers, afterwards, refused to receive the deed, or to have anything more to do with the contract, and instituted an action for money had and received, against the vendor, to recover back the \$700. The decision of the Court was against the plaintiffs. The action was brought by the persons who had, by their own breach of the agreement, prevented a performance by the defendant of his part of it, and they could not, therefore, recover against him. The Court in that case says: "It would be an alarming doctrine to hold that the plaintiffs might violate the contract, and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover back that the plaintiffs have." *Ketchum et al. v. Evertson*, 13 Johns. Rep., 359.

The *English* Court of Common Pleas, it is true, has given a different decision, in a case similar in principle to the one we have just cited. The case was this: A loan-contractor gave

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to the lender scrip receipts, showing a deposit in respect of a certain amount of *Neapolitan* stock, and entitling the bearer of the receipts to a certificate for that amount of stock, upon payment of the balance by a certain time; but there was no stipulation that the deposit should be forfeited if the balance were not paid. The balance was not paid, and the holder of the receipts sued the contractor for the amount of [*225] the deposit, *in an action for money had and received.

The Court of Common Pleas held, that the action could be sustained. *Hennings v. Rothschild*, 4 Bingh., 315. But there was a writ of error to this judgment, and the Court of King's Bench reversed it. The Court in error said that time, in that case, was of the essence of the contract; and they also said, "that the claim of the plaintiff below to a return of the deposit, as being retained by the defendant without consideration, could not be maintained, because the plaintiff had full consideration for the deposit, in the option which the scrip receipts gave him, to become the proprietor of so much stock by payment of the balance of the price on the day named; and this was not the less a consideration, because the plaintiff did not think fit to avail himself of the option." *Rothschild v. Hennings*, 9 Barn., & Cress., 470. This opinion of the King's Bench, is founded on a decision of the Court of Chancery precisely in point. *Doloret v. Rothschild*, 1 Simons & Stuart, 590.

These decisions in *New York* and in the *English* Courts of King's Bench and Chancery directly show, that upon the facts contained in the record before us, the defendant below is not liable to the plaintiffs for the money advanced upon the contract, in an action for money had and received.

The same objection which is fatal to that action; viz: the plaintiffs' non-performance of the precedent condition, would also prevent their recovery in a special action on the agreement. They could not expect to recover damages for the defendant's non-performance of his part of the agreement, when the facts prove that they themselves were the sole cause of the breach of contract of which they complain.

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The remarks which we have thus made with respect to an action for money had and received, and to a special action on the agreement, are not strictly applicable to the present cause, as it is presented to us by the pleadings. We have thought, however, that it would not be improper to make them, as it is probable, from the course taken in the argument, that the parties may wish and expect to have our opinion on the subject. The real question which we are required by this cause to decide is, whether the defendant's second and third pleas show, that the note declared on is without consideration? That question, as we have already said, must be decided in the affirmative.

[*226] **Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

O. H. Smith, for the plaintiff.

J. Perry, for the defendants.

HARRISON and Another v. HIXSON and Another.

CARRIER—VARIANCE.—In a suit against a carrier, the declaration stated the goods to have been delivered to the defendant on board a schooner to be safely carried from *Michigan City* to *Buffalo*, &c., “the dangers of the seas only excepted.” The exception contained in the bill of lading offered in evidence by the plaintiff was, “the dangers of the lakes and rivers excepted.” *Held*, that the variance was immaterial.

BILL OF LADING—EVIDENCE.—A bill of lading with no qualifying terms is *prima facie* but not conclusive evidence, that the goods consigned belong to the consignee.

SAME.—The consignor of goods, in an action against the carrier for their loss, may introduce the bill of lading to prove the delivery of the goods, and may then show by parol testimony, that the goods belong to himself and not to the consignee.

ERROR to the *La Porte* Circuit Court.

DEWEY, J.—This was an action on the case by the plaintiffs in error against the defendants in error. The declaration contains four counts. Three of them are substantially the same, and charge that the plaintiffs, at the request of the defend-

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ants, caused to be delivered to them, on board the schooner *Post-Boy*, a quantity of wheat to be carried by them from *Michigan City* to *Buffalo* in the State of *New York*, and there to be delivered for the plaintiffs, for a certain freight or reward, the dangers of the seas only excepted; that the defendants received the wheat for that purpose, and that although the schooner sailed from *Michigan City* on her voyage to *Buffalo*, the wheat was lost through the negligence and mismanagement of the defendants. The fourth count alleges that the defendants were common carriers, and as such received a quantity of wheat of the plaintiffs in their schooner called the *Post-Boy*, to be carried from *Michigan City* to *Buffalo*, but so negligently managed their vessel that the wheat was lost on the voyage. Plea, general issue, jury trial, and judgment for defendants.

On the trial of the cause the plaintiffs—having [*227] proved that *the defendants were the owners of the schooner *Post-Boy*; that one of them, *Hixson*, was her commander; that he had as such executed a bill of lading, and that the wheat named in it was the same mentioned in the declaration—offered it in evidence to the jury, and at the same time offered to prove that one *Miller* (mentioned in the bill of lading), was their forwarding merchant, that the wheat specified in it was their property, and that it was consigned to *Eaton*, a commission merchant, to be sold on their account. The bill of lading and the explanatory parol testimony having been objected to by the defendants, were excluded from the jury by the Court. The plaintiffs excepted, and then proposed to prove by parol that the wheat mentioned in the fourth count of the declaration was delivered by the plaintiffs to the defendants, to be by them conveyed as common carriers, as therein alleged. This proof was also, upon the objection of the defendants, rejected, and exception taken by the plaintiffs.

The bill of lading acknowledged the shipment on board the *Post-Boy*, *Hixson*, master, of 413 bushels of wheat in good order, by *Miller* for *A. Eaton*, *Buffalo*, sent by the plaintiffs, to be delivered in like good order at the port of *Buffalo* (the

dangers of the lakes and rivers excepted), to *A. Eaton*, or assigns, he paying freight.

In support of the decision of the Circuit Court in excluding the bill of lading and the explanatory testimony, it is contended that there is a fatal variance between the undertaking of the defendants as stated in the declaration—"the dangers of the seas only excepted"—and that contained in the bill of lading: "the dangers of the lakes and rivers excepted." We do not consider the variance to be material. The meaning of the two expressions, as applied to our inland navigation, is the same. Had the declaration stated the exception in either set of words, and the bill of lading had contained no exception at all, and *vice versa*, the objection to the admissibility of the evidence should have been sustained. But as the case stands, there was no variance which should have excluded the testimony.

It is also urged that the bill of lading was inadmissible, because it proved the ownership of the wheat not to be in the plaintiffs, but in *Eaton*, the consignee. It is true that a bill of lading, with no qualifying terms, is *prima facie* evidence that the property consigned belongs to the consignee. [*228] 1 *Ld. Raym.*, *271; 6 *East.*, 21. But it is not conclusive evidence of that fact; it is susceptible of explanation by rebutting testimony, showing the consignor to be the real owner of the property. 3 *Barn. & Adol.*, 523, *Scaif et al. v. Tobin*; 2 *M. & M.*, 106, *Bates v. Todd*; 6 *East*, 21, *n.*; 7 *Mass. Rep.*, 301; 1 *Johns. R.*, 1; *Ib.*, 223; 6 *Cranch*, 338; 1 *Wheat.*, 25; 2 *Dall.*, 180; 20 *Johns. R.*, 226. The plaintiffs were entitled to the benefit of the bill of lading to prove the delivery of the property to the defendants, and the terms on which they received it. The Circuit Court erred in rejecting the bill of lading and the explanatory evidence.

It was also error to reject the parol testimony offered in support of the fourth count of the declaration.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. Fletcher, O. Butler and S. C. Sample, for the plaintiffs.

C. W. Ewing, J. Rariden and J. S. Newman, for the defendants.

Doe on the Demise of Maguire v. Smith.

DOE on the Demise of MAGUIRE v. SMITH.

TRANSCRIPT—EVIDENCE—PLACITA.—A transcript of the record of a judgment is not admissible as evidence unless it have a *placita*, and be legally authenticated.(a)

SHERIFF'S SALE—VALIDITY OF—After a town lot had been sold on execution, the execution-debtor brought an ejectment for the lot against a person who claimed it under the purchaser at the sheriff's sale. *Held*, that the propriety of the sheriff's conduct in selling the whole, instead of a part of the lot, was a proper subject of inquiry, and that evidence relative to the divisibility and value of the lot was in such case admissible.(b)

SAME.—The plaintiff in such case, in order to impeach the defendant's title may prove that when the sheriff sold the lot it was known to the purchaser and to the defendant that the rents and profits had not been offered for sale.

ERROR to the Wayne Circuit Court.

BLACKFORD, J.—Ejectment for a half lot of ground in *Richmond*. Verdict and judgment for the defendant. On the trial the plaintiff introduced the following agreement: "It is admitted by the parties that the plaintiff's lessor was the owner of the premises named in his declaration in [*229] fee-simple, in the *spring of the year 1827, and held possession of the same, and still is the owner in fee-simple, and has the right to the possession thereof, unless the defendant can show a paramount title derived from or through him."

The defendant then offered to prove that a judgment, in favour of a third person, had been rendered against the plaintiff's lessor; that the judgment had been replevied; and that an execution had issued on the replevin-bond, which was returned satisfied. He further offered in evidence the sheriff's deed for the premises to the purchasers at the execution-sale, who had paid for the property \$750, and also a deed to himself for the same property from one of those purchasers. All this evidence, offered by the defendant, was objected to, but the objection was overruled and the evidence admitted.

(a) See *Snyder v. Snyder*, 25 Ind., 399; *Phelps v. Tilton*, 17 Ind., 423; *Oline v. Gibson*, 23 Id., 11.

(b) *Castlett v. Gilbert*, 23 Ind., 614; 1 Ind., 575; 30 Id., 332.

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The plaintiff then offered to prove, that the premises in dispute were forty-eight feet in front and one hundred and thirty-two feet in depth; that there were two houses on the same in front; and that either might have been sold without injury to the other, for a much larger sum than the amount of the execution; that the premises were worth at least \$1,500; and that the rents and profits for six months would have paid off the execution. He offered further to prove, that the defendant and the purchasers at the sheriff's sale, were acquainted with the situation of the premises, and with their value; and that they all stood by and heard the sheriff sell the premises, and knew that he did not offer for sale the rents and profits for seven years, or for any other period; but that he sold the fee-simple in the first instance. This evidence, offered by the plaintiff, was objected to, and the objection sustained.

There are several errors in this record.

The paper offered by the defendant as evidence of the judgment against the plaintiff's lessor, is as follows: "*James Orr v. James Maguire*, on appeal. And now, at this day, to-wit, on the 1st of *March*, 1827, here come the parties by their counsel, and by agreement this cause is submitted to the summary decision of the Court. Whereupon, the testimony being heard, and mature deliberation thereupon had, it is considered by the Court, that the plaintiff recover of the defendant the sum of \$14.60 in debt, together with his costs," &c. This transcript contains no *placita*, nor has it any authentication. The Court in which the judgment [*230] was rendered *is not shown. Without looking any further into this subject, we are satisfied that the objection to the admission of this paper as evidence of a judgment, should have been sustained.

That part of the evidence offered by the plaintiff, relative to the divisibility of the premises and to their value, was improperly rejected. Whether the sheriff, in selling the whole instead of a part of the half lot levied on, had exercised a sound, legal discretion, and had acted with good faith, or

whether his conduct on the subject was a flagrant abuse of his power, and a fraud upon the execution-debtor, were legitimate questions, under all the circumstances of the case, for the consideration of the jury. The testimony we have referred to, was material in the investigation of those questions, and should therefore have been admitted.

The other part of the plaintiff's evidence, which was rejected, was also admissible. It has been said by this Court, that it may be safely presumed by a *bona fide* purchaser at a sheriff's sale, that the sheriff has done his duty in obeying the directions of the statute as respects the inquest, the advertisement of sale, &c. *Armstrong v. Jackson*, Nov. Term, 1822. We think, also, that such a purchaser has a right to presume, that the sheriff has done his duty as to the offering of the rents and profits for sale. But that is not the only subject of inquiry presented by this part of the cause. The evidence offered was not merely to prove that the rents and profits had not been offered for sale, but that the purchasers and the defendant all knew that fact, at the time of the sale. The offer to prove this additional circumstance, makes a very material difference. The evidence of that knowledge of the purchasers and of the defendant, ought to have been admitted. It tended to show, that the purchasers had combined with the sheriff to defraud the execution-debtor, and that neither they, nor the defendant, were *bona fide* purchasers.

It may be that the evidence to which we have adverted, which was offered by the plaintiff to impeach the sheriff's sale, will not prove to be sufficient for the purposes intended by it. The plaintiff's success in this suit, so far as this part of the cause is concerned, depends upon the question, whether the sale was fraudulent and consequently void? The determination of that question is for the jury. It may appear, before the evidence on both sides is closed, that the plaintiff's

[*231] lessor was *present at and consented to the sale of the lot without its being divided, and, also, that he consented to the sale without a previous offer for sale of the rents and profits. It may appear, that he encouraged the

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purchasers to buy the property at the sheriff's sale, or that he advised the defendant to make his purchase. It may also appear, that the lessor received the overplus of the purchase money from the sheriff, and that he still retains it. These are all matters, with many others that might be mentioned, which may possibly belong to the cause, and which if proved, may have an influence on the verdict.

Per Curiam.—The judgment is reversed and the verdict set aside with costs. Cause remanded, &c.

J. Raviden and *J. S. Newman*, for the plaintiff.

J. Perry and *M. M. Ray*, for the defendant.

GORDON and Another v. COWGER.

VENDOR AND PURCHASER—MISREPRESENTATIONS.—The vendor of a tract of land containing a certain number of acres, brought a suit against the vendee for the purchase-money. The defendant who retained the land, but who wished to have a reduction of the price, proved that a certain field, which the vendor had represented to be included in the premises, was not so included.^(a)

Held, that the question whether the land was worth less, and if so, how much less, than it would have been had the boundaries not varied from the description, was a proper subject of inquiry; and that the plaintiff, as well as the defendant, had a right to introduce evidence on the subject.

PLEADING—PROOF.—If to an action on a note for the payment of money, the defendant plead a failure of the consideration, setting out the contract under which the note was given; his proof of the contract must agree with the description of it in the plea.

APPEAL from the *Rush* Circuit Court.

BLACKFORD J.—*John* and *Samuel Gordon* brought an action of debt against *George Cowger*, on a writing obligatory for the payment of \$100.

The defendant pleaded specially, that the consideration of the bond was the difference in an exchange of two tracts of land of eighty acres each, made by the parties. The plea

(a) See *Post v. Williams*, 6 Ind., 219.

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states that the plaintiffs, to induce the defendant to make the exchange, and give them as the difference the bond [*232] sued on, *together with another bond for the same amount, and fifty bushels of corn, and two acres of wheat in the ground, pointed out and represented to the defendant, that they had measured their own tract, and that the west line included a certain field then pointed out by them, and ran south so as to include a certain piece of bottom land of about fifteen acres, of the value of \$200. The plea further states, that the defendant not knowing the lines, and relying on the plaintiffs' representations, made the exchange, and, accordingly, conveyed to them his eighty acres of land of the value of \$600, and gave them the bonds, one of which is paid, and delivered to them the corn and wheat; that the defendant has since ascertained, that the west line of the land, received by him from the plaintiffs, did not run so as to include the field or bottom land aforesaid, the value of which is \$200; that the land thus received by the defendant is of \$200 less value than it would be if the west line had run according to the plaintiffs' representation; and that the bond in question was given for no other consideration than that mentioned in the plea. Wherefore, &c.

The replication to this plea is, that the bond was executed for a valuable consideration, and not in consequence of the false and fraudulent representations set forth in the plea.

The issue was tried by a jury, and a verdict and judgment were rendered for the defendant.

On the trial, there was proof that there were on the land conveyed to the defendant, a mill and mill-seat; and the defendant introduced evidence to prove that the land, as the west line really runs, was worth less than it would have been, had it run as the plaintiffs represented it. The plaintiffs then offered to prove, that if their description had been correct, the land would not have included the mill-dam which it now does include; and that the land is consequently more valuable. This evidence, offered by the plaintiffs, was objected to, and the objection sustained.

If the misrepresentation relied on by the plea be true, the defendant, perhaps, when he discovered the description of the land to be incorrect, might have rescinded the contract, if the parties could have been placed *in statu quo*: but he did not choose that remedy for the misrepresentation complained of. He has preferred to keep the land as it is, and to set up the misrepresentation in avoidance as to a part of the [*233] price. The *ground of his defence is, that he has sustained a loss by the misrepresentation; and the question respecting that loss is submitted by the parties to the determination of a jury. In determining the amount of the loss, if any, the jury must know how much less the land, which the defendant has received, is worth than it would be had it agreed with the plaintiffs' description. That diminution, whatever it may be (the misrepresentation being proved), must influence the verdict as regards the reducing or barring the plaintiffs' recovery.

When a Court of Chancery compels a purchaser to execute his contract, but allows him a compensation on account of the vendor's misrepresentation of the premises, the amount of that compensation generally depends upon how much less the land is worth than it would have been had it not varied from the description. The same rule must govern in the case before us. If the land received by the defendant, and which he retains, is not so valuable as it was described to be, the amount of the diminution is a proper subject of inquiry in this action for a part of the purchase-money.

The defendant, as he was bound to do, introduced evidence to show the diminution in the value of the premises as stated in his plea; and it was for the plaintiffs, if they could, to prove that no such diminution existed, or, at any rate, that it was not so great as the defendant wished it to be considered. The plaintiffs, accordingly, offered evidence for that purpose. They proposed to prove, after it had been shown that there was a mill on the land, that the mill-dam, which was on the land as it was conveyed, would have been excluded if the west line had run according to the representation. That evidence tended

to disprove the allegation in the plea as to a diminution in the value of the premises. The evidence was proper, and the Court committed an error in rejecting it.

After the testimony was closed the plaintiffs asked the Court to instruct the jury, "That if there had been no evidence given, that a part of the contract in the exchange of the land was the corn and wheat named in the plea, the contract was not proved as laid, and the jury must find for the plaintiffs." This instruction was refused. If the defendant had sued the plaintiffs for a breach of the contract described in the plea, and had failed to prove the part of the contract referred to, his action must have failed. The variance between the
[*234] *allegation and the evidence would have been fatal.

1 Chitt. Plead., 333. We consider the law to be the same in the present case. The contract is entire, and the proof of it, when described and relied on in the plea, must be in accordance with the description as much in the one case as in the other. The instruction asked for ought, therefore, to have been given.

The plaintiffs also requested the Court to instruct the jury, "That if there had been no evidence given by the defendant, that he exchanged and conveyed the land named in the plea, the plea was not substantially proved, and the jury must find for the plaintiffs the amount of the note. The Court refused this instruction. The plaintiffs had a right to this instruction, as well as to the other which we have just mentioned, and for the same reason. The exchange and conveyance of the defendant's land are stated in the plea as a part of the contract, and unless they were proved, the contract is not proved as laid.

Per Curiam.—The judgment is reversed and the verdict set aside with costs. Cause remanded, &c.

O. H. Smith, for the appellants.

J. Rariden and *J. S. Newman*, for the appellee.

WEST and Others v. BLAKE.

INDIANAPOLIS—TOWN PLAT—EVIDENCE.—The statute of 1831, entitled “An act to authorize the Agent of State for the town of *Indianapolis*, to lay off the lands belonging to the State into lots and offer the same for sale,” is a public act; and it is therefore no objection to the admission, as evidence, of the plat of that town, executed, &c., as the said act prescribes, that the act is not pleaded.(a)

SAME—STREETS, &c.—HIGHWAYS.—The above-named statute, by causing a survey, &c., of the town of *Indianapolis* to be made, and declaring the map of the same to be a public record, constitutes, of itself, the streets and alleys in the town public highways.

TRESPASS—JUSTIFICATION.—If a plea in trespass *quare clausum fregit* justify the gist of the action, and plaintiff wish to prove that the defendant exceeded the right or authority alleged in his justification, the excess must be specially replied.

APPEAL from the *Marion* Circuit Court.

DEWEY, J.—This was an action of trespass *quare clausum fregit*. *Blake* declared against *West* and others for [*235] breaking and entering his closes, alleging in aggravation of damages, the throwing down and destroying his fences, gates, &c., the trampling his grass, herbage and grain, and tearing up and spoiling his soil, &c. Pleas, first, the general issue; secondly, a special plea, alleging that when, &c., there were common and public highways, commonly called streets and alleys of the town of *Indianapolis*, through, over, and along the closes in which, &c.; that in passing and re-passing over the said ways they had committed the supposed trespasses complained of by the plaintiff, doing as little injury to him as possible, &c. To this plea there was a general replication, that the defendants had committed the injury of their own wrong without the cause which they alleged. Issue upon the replication.

By consent of parties the cause was submitted to the Court for trial without a jury. The plaintiff proved his possession of the closes, and the breaking and entering them by the

(a) *Ketcham v. The State*, 12 Ind., 260; 8 Blackf. 130.

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defendants, the throwing down his fences, &c.; he also proved that they burned a quantity of rails. The defendants gave in evidence the plat of the town of *Indianapolis*, deposited in the recorder's office of *Marion* county, agreeably to an act of the Legislature, approved *February* 9th, 1831. They then proved that all the acts established by the plaintiff to have been done by them were committed on the streets as laid out in said plat, in removing fences, &c. All the evidence on each side was objected to as offered, the objections overruled, the testimony admitted, and exceptions taken. The Court gave judgment for the plaintiff; the defendants took exception and appealed.

It was contended in the argument of this cause, that the general replication, *de injuria*, does not put in issue, but admits, the existance of the highways set up in the special plea. The view which we shall take of the case renders it unnecessary to decide upon the correctness of this point.

We shall consider, in the first place, whether the plat of the town of *Indianapolis* was properly admitted as evidence, and what is its legal effect? This must depend upon the solution of another question, and that is, whether the statute of *February* 9th, 1831, entitled, "An act to authorize the agent of the State for the town of *Indianapolis* to lay off the lands

belonging to the State into lots, and offer the same for [*236] sale," be *a public or private act. That statute is one of a series of legislative measures on the subject of the seat of government, commencing in 1820, and extending down to the time of its passage. By virtue of these various acts, the site for the seat of government was selected, a town laid out upon it, its plat recorded, the town named, an agent appointed, and his duties prescribed, the town adopted as the capital of the State, out-lots from time to time, conformably to the original plan, laid out and sold. These laws also contain many other provisions of an equally public character. On the 24th of *January*, 1831, the Legislature declared by an act republishing them, that all these acts should be public statutes; and soon afterwards, during the same session, passed the act in

question. By this act the agent is required "to cause the lands round the said town, belonging to the State, to be accurately surveyed and divided into lots, according to the plan designated on the plat presented by the agent to the House of Representatives, and cause the corners and boundaries," &c.; and it is made his further duty, "so soon as the survey is completed, to cause to be made out two complete maps or plats of the town of *Indianapolis*, designating the names and width of the several streets and alleys, the number and size of the several squares—designating those that are set apart for public purposes, the number and size of the several in-lots, and the number and size of the several out-lots, as now established by law, and also the form, courses and distances of their boundaries, the contents and number of the several lots, and the width and courses of the several streets and alleys by this act authorized to be laid out,"—one of which maps "shall be deposited in the office of the recorder of *Marion* county, who shall endorse thereon a certificate of the time of depositing the same, and the plat so deposited shall be considered a public record."

There is no express provision making this a public act, nor was such a provision necessary to give it that character. Should this statute be considered to be a special act, it would follow that a part of the out-lots have been laid off, and parts of the streets and alleys between them, as marked and designated in the public record, have been established by virtue of a public law, and other parts by a private statute; and that some of the duties of the agent, similar in their nature, have been prescribed by public—some by special acts.

[*237] The *Legislature can not have designed to build up a system for the regulation of the capital of the State so patched and incongruous as this. The objects and purposes of all these laws are public. That the subject of them is local does not change their character. Statutes incorporating counties, fixing their boundaries, establishing court houses, canals, turnpikes, railroads, &c., for public uses, all operate upon local subjects. They are not, however, for that reason, special or private acts. The statute, then, under consideration

is a public act, of which the Courts are bound to take notice without its being pleaded. The public record created by it was legal evidence in support of the plea of the defendants.

But it is contended that the streets and alleys designated upon it are not public ways, without having been first opened by some agent authorized to do so; or without having been sanctioned by use. This objection can not be sustained. The Legislature may establish a road by a direct act of legislation; or they may do it through the agency of commissioners, viewers, and Courts. In the case before us, they have done it by directing the agent for *Indianapolis* to take the necessary steps as to causing surveys to be made, and metes and courses to be designated, and by declaring the map with those metes and courses to be a public record. Nothing more was necessary to render the streets and alleys of *Indianapolis* public ways. As such the defendants had a right to use them, and for that purpose to remove obstructions. This they did, and have proved that the removal of them was the injury complained of by the plaintiff. Their justification, therefore, as to breaking and entering the closes, the gist of the action, is complete.

The plaintiff, however, urges that the judgment of the Circuit Court is correct, because, admitting the existence of the ways and the right of the defendants to use them, they were guilty of a trespass for using in an unlawful manner. Whether the evidence shows that they did so use them, is not for us to say. But this position of the plaintiff gives rise to another question, which is, whether, under the issue formed by his replication of *de injuria sua propria*, it was competent for him to prove the unwarrantable conduct of the defendants? The law on this point is against him. The doctrine is well settled, that when the plea justifies the gist of the

[*238] action, it is *an answer to the whole declaration, and that if the plaintiff intends to rely upon matter showing that the defendant exceeded the right or authority alleged in his justification, he must reply it specially, and can not adduce it in evidence under the general replication 1

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Selw. N. P., 4th Amer. Ed., 30; 7 Johns. R., 109; 7 J. B. Moore, 33; 2 Wils. R., 313; 3 Burr., 1385; 5 Taunt., 69; 2 Camp., 175; 3 Term Rep., 297. The admission, therefore, on the part of the plaintiff, of evidence tending to prove the unnecessary destruction of his rails by the defendants, was erroneous.

Per Curiam.—The judgment is reversed with costs. Cause remanded, with leave to the plaintiff to amend his replication, &c.

J. B. Ray, for the appellants.

J. Morrison, W. Quarles, C. Fletcher and O. Butler, for the appellee.

ELLIOTT v. COGGSHALL.

FRAUD.—In assumpsit for goods sold and delivered, a general plea of fraud is good even on special demurrer.^(a)

APPEAL from the *Wayne* Circuit Court.

DEWEY, J.—Assumpsit for goods sold and delivered. Pleas, general issue, and “fraud, covin, misrepresentation and deceit.” Demurrer to the latter, assigning for cause: 1st, That it amounts to the general issue; 2d, That it does not allege the particulars of the fraud. Demurrer sustained; jury trial on the general issue; and final judgment for the plaintiff. The defendant appeals.

The only question presented for our consideration is, whether the plea alleging fraud in the general terms above stated, is good in form as well as substance?

In the case of *Pence et al. v. Smock*, 2 Blackf., 315, this Court decided that such a plea was valid in debt on specialty. In the subsequent case of *Huston v. Williams*, 3 Blackf., 170, a similar plea was sustained so far as to let in proof of fraud in

^(a)See *Thomas v. Quick*, 5 Blackf., 334.

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the execution of a writing obligatory ; but an opinion [*239] was *expressed that a plea of fraud, whether in general or special terms, implicating the consideration of a specialty could not, independently of our statute, constitute a defense at law. As, however, that question was not in that case, and is not in this, the point directly before the Court, and as good authorities conflict on the subject, we express no opinion in relation to it on this occasion.

That fraud in the consideration of a simple contract is a good legal defense, we believe has never been seriously doubted: that it is, the case last referred to has established but it still remains to be settled whether it may be alleged in the general terms of the plea in this record. In the case of *Huston v. Williams*, the plea was sustained on the ground, that under it the same evidence was admissible, that might have been given under *non est factum*. The analogy arising from that decision is in favour of the validity of the plea of fraud in general terms, in actions on simple contracts; for under the general issue in those actions, fraud, as well as almost every other matter, which may be the subject of a special plea, can be given in evidence. A plaintiff, therefore, who declares upon a simple contract, must come into Court prepared to show, not only that he has a good cause of action *prima facie*, but also to rebut every thing which implicates its validity *ab initio*, or which tends to prove its discharge, satisfaction, or release. He can not complain that a plea *per fraudem* generally, takes him by surprise. In truth, it narrows the ground of controversy to a single subject, with the particulars of which, in a large majority of instances, he is as well acquainted as his adversary.

Chitty says—"A general plea that a deed was obtained by the plaintiff by fraud and misrepresentation is good." 1 Ch. Pl. 5 Ed., 570. It can not be said, that in thus speaking of such a plea, he meant to apply the remark to those general pleas of fraud designed only to question the execution of the instrument. The reason which he assigns (in the words of Lord *Ellenborough*, in the case of *Hill v. Montagu*, 2 M. & S.,

378), forbids such a construction of his language. Reference to that case will show, that he designed to lay down a rule of pleading in all cases of fraud. The action in that case was founded upon a specialty; the defendant pleaded usury in general terms; upon special demurrer the plea was [*240] held to be bad. Lord **Ellenborough* remarked:

“Usury is not like fraud and covin, which usually consists of a multiplicity of circumstances, and therefore it might be inconvenient to require them to be particularly set forth.” In making this remark, the judge’s attention was directed, not to the execution of an instrument, but to its consideration. *Chitty* also cites *Tresham’s* case, 9 Co., 110. It is possible, that case does not quite support the unqualified proposition laid down by *Chitty*, but it shows conclusively that he had reference to pleas extending the alleged fraud beyond the mere execution of a deed; for the fraud—which was averred in the replication—had nothing to do with the execution of an instrument. It consisted in not causing certain recognizances, which had been paid and satisfied, to be cancelled, and in setting them up as outstanding debts against the estate of an intestate. But whatever may have been the manner of pleading fraud in *England* in the time of *Coke*, it is certain that *Chitty* is fortified in his position, not only by the opinion of Lord *Ellenborough*, but by later authorities in that country.

In the case of *Waldo v. Martin*, in covenant, in addition to *non est factum*, and pleas setting forth illegality of the consideration, was a plea “that the indenture in the declaration mentioned, was obtained and procured from the defendant by fraud, covin, and deceit of plaintiff.” Issue was taken upon this plea without objection, and a jury trial had. 4 B. & C., 319. *D’Aranda v. Houston et al.*, reported in 6 Carr. & Payne, 511, was a case of debt on a bond. Pleas—*non est factum*, and “fraud, covin, and misrepresentation.” Issues, and jury trial. As in both these cases *non est factum* was pleaded, it can not be inferred that the pleas of fraud were designed to try the same issue. Indeed, it is shown that in

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the latter case, evidence was given to the jury touching the consideration of the bond. In *Kentucky*, the general plea of fraud has been held to be good, upon demurrer, in actions both upon simple contract and deed. 1 J. J. Marsh., 106; 2 Dana's Rep., 161.

We lay no stress upon the authorities quoted in their applicability to specialties, as their bearing in that respect is not the matter which we are considering. But as to the propriety of a general plea of fraud, impeaching the consideration of a simple contract, they seem to be conclusive. Indeed, without their aid, we have no difficulty in pronouncing such [*241] a plea *good, inasmuch as fraud constitutes a legal defense under the general issue, and the effect of the plea is only to limit the ground of contention between the parties, as before observed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, with leave to the plaintiff to withdraw his demurrer and reply, &c.

J. Rariden and *J. S. Newman*, for the appellant.

M. M. Ray, for the appellee.

COMAN and Others v. THE STATE, on the relation of ARMSTRONG, Treasurer, &c.

COUNTY BOARD—POWER OF.—An order of the board of county commissioners giving the collector of the county revenue a longer time for payment of the revenue of the year than the law prescribes, is without authority, and wholly inoperative.(a)

PRINCIPAL AND SURETY—GIVING TIME TO PRINCIPAL.—A prolongation of the time of payment, given by a creditor to his debtor without a new contract founded on a valid consideration, though given without the consent of the surety of the debtor, will not exonerate the surety from his liability.

BEST EVIDENCE.—The rule of law that the best evidence which the nature of the case admits of must be produced, applies as well to secondary as to primary evidence.(b)

(a) *Carr v. Howard*, 8 Blackf., 190.

(b) *Carpenter v. Dame*, 10 Ind., 125.

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SAME.—If, in an action against the collector of county revenue, the defendant do not produce the duplicate of the assessment-roll, upon notice given him to produce it, the assessment-roll in the clerk's office is the next best evidence of the contents of the duplicate, and must be produced, or its absence accounted for, before parol evidence of the contents of the duplicate can be received.(c)

ERROR to the *Dearborn* Circuit Court.

DEWEY, J.—This was an action of debt in favour of the State of *Indiana*, on the relation of *Armstrong*, treasurer of the county of *Dearborn*, against *Russel Coman* and his sureties, on his official bond as collector of the State and county revenue for that county.

The declaration assigns the breach of the condition of the bond to be in the collector's failing to collect and pay the county revenue to the treasurer for the year 1832. *Coman*, the collector, appeared to the action, but made no defense. The other defendants, his sureties, pleaded several pleas, on which issues were formed, and which need be no further noticed in this decision. They also pleaded that the [*242] board of county *commissioners of *Dearborn* county, at their session of *January*, 1833, and on the first *Monday* of that month, at which time the county tax mentioned in the declaration became due and payable to the county, without their knowledge or consent, made and entered on the minutes of their proceedings an order, by which they gave further time until the first *Monday* of *March* next thereafter to *Coman*, to pay the revenue for the year 1832; and they allege that on the first *Monday* of *January* aforesaid, and long thereafter, *Coman* was solvent and able to pay the amount due from him, but afterwards became insolvent, and remained so to the time of the plea pleaded.

To this plea there was a general demurrer, and judgment upon it for the plaintiff. The jury found all the issues for the plaintiff. The Court rendered final judgment for the State.

On the trial of the cause, the plaintiff proved that a duplicate of the assessment-roll, and a precept to collect the taxes, had

(c) *Holbert v. The State*, 22 Ind., 125.

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been duly delivered to *Coman*, the collector; that he had not returned either; and that timely notice had been given him to produce both on the trial. The precept was produced by the defendants, but the duplicate was not, upon which the Court permitted the plaintiff to give parol evidence of the contents of the latter.

The errors relied on to reverse the judgment of the Circuit Court are: 1st. Sustaining the demurrer to the plea; 2d. Admitting parol evidence of the contents of the duplicate.

The first error assigned can not be sustained. The duty of the collector is prescribed by law. It is, in part, to collect the taxes. And upon his failing to pay to the county treasurer those assessed upon his county, on or before the first *Monday* in *January*, it is made the imperative duty of that officer "to proceed, with due diligence, to commence suit" against him and sureties upon his bond. The powers of the board of commissioners are also fixed and designated by law. Among them is not the right to interfere with, or in any way affect the course marked out for the collector or treasurer. That board can neither abridge nor enlarge the duties or liabilities of those officers. The order giving further time in which to pay the revenue was therefore wholly inoperative. But merely a prolongation of the time of payment, given by a creditor to his debtor, without a new contract founded on a good consideration, though done without the consent of the surety [*243] of the debtor, will not exonerate the surety from his liability. 1 Blackf., 392 and notes. The demurrer was correctly overruled.

The second error is well assigned. The parol evidence of the contents of the duplicate of the assessment-roll should not have been admitted. Passing over the question of the sufficiency of the notice to produce the paper, served on one only of the defendants, an unanswerable objection to the legality of the evidence will be found in the fact of the existence of written testimony of the same matter, which was permitted to be proved by parol. The rule of law, that the best evidence which the nature of the case will admit of must be

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adduced, applies as well to secondary as to primary evidence. When an original writing is lost, or in the possession of the adverse party, upon the preliminary steps being taken, its contents may be proved, first, by a counterpart, if one exist; secondly, by a copy, if there be no counterpart; and thirdly, by parol testimony, if there be neither counterpart nor copy. 2 Saund. Pl. & Ev., 349; Roscoe on Ev., 7; 2 Atk., 71; 1 Camp., 192; B. N. P., 254; 2 Camp., 605; 2 Taunt., 237. By the revenue law of 1831, sec. 14, it is made the duty of the clerks of the Circuit Courts to perfect the assessment-roll of taxes for their respective counties, and to make a "complete duplicate or transcript" of it, and deliver the same, together with a precept, to the collector. In the case before us, the assessment-roll (which, for aught that appears, was in the office of the clerk of the Court which tried this cause), was the best evidence of the contents of its duplicate which had been delivered to the collector, and should have been resorted to, or its absence accounted for, before the admission of the parol testimony to prove such contents.

Per Curiam.—The judgment is reversed and the verdict set aside. Cause remanded, &c.

G. H. Dunn and *D. J. Caswell*, for the plaintiffs.

J. Sullivan and *S. C. Stevens*, for the defendant.

[*244] *WEST v. M'CARTY and Others.

ABSCONDING DEBTOR—RIGHTS OF CREDITORS.—*A* being indebted to *B* absconded, leaving personal property in *C*'s hands. *C*, afterwards, bought part of the property at an execution-sale, paid debts of *A* with another part of the property, and retained the residue for a debt due to himself from *A*. Held, that without proof of fraud, *B* could not sustain a suit in chancery against *A* and *C*; but that he might have attached *A*'s property in *C*'s hands, and might also, by summoning *C* as a garnishee, have secured any debt due by the latter to *A*.(a)

(a) *Latham v. Barlow*, 6 Blackf., 97; *Shirley v. Shields*, 8 Id., 273; *Love v. Mikals*, 11 Ind.,

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APPEAL from the *Marion* Circuit Court.

DEWEY, J.—This was a suit in chancery commenced by the appellees, *Nicholas M'Carty* and *David Williams*, partners in merchandise, and *Jacob Landis* and *Philip Landis*, partners in merchandise, against *J. L. Potter* and *Thomas West*.

The bill alleges that *Potter* was indebted to the respective firms in certain sums; that being so indebted, he and *West* combined together for the purpose of cheating them out of their debts, and that in order to effect that purpose, they made a fraudulent arrangement by which *Potter*, without any consideration, transferred a large amount of notes, accounts, obligations, mortgages and indentures to *West*; that *Potter*, immediately after this fraudulent transaction, secretly absconded, and had ever since remained out of the jurisdiction of the State; that after the departure of *Potter*, *West* concealed and converted to his own use a large amount of other property which had been left by *Potter*, with intent to defraud the complainants and other creditors of *Potter*; that *West* also claimed as his own, horses, wagons and other property which had been left in his possession by *Potter*; but that fearing he would be detected in his fraud, he caused an execution for about thirty dollars to be levied upon the property so left; and by fraudulent practices became himself the purchaser of it at constable's sale, at a price much below its value. The bill further charges that *Potter*, at the time he absconded, was the owner of several certificates, bonds, deeds and other writings obligatory, for several lots in the town of *Indianapolis*, which he fraudulently transferred to *West*; and that *West* had been for several years before the fraudulent transfers aforesaid, the journeyman of the said *Potter*; that he had fraudulently [*245] *converted to his own use, several hundred dollars' worth of property belonging to *Potter*; that he had secretly transmitted large sums to *Potter*, and still retained a considerable amount in his own hands.

The answer of *West* denies fraud, and negatives the assignment to him, either fraudulently or otherwise, of any property or choses in action—denies all knowledge of any certificates or

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other evidences of ownership in *Potter* of any real estate legal or equitable—admits that *Potter* left the State and that he has not returned, but alleges that *West* had no knowledge or suspicion that he did not intend to return until long after his departure, and states that when *Potter* went away, he declared that his intention was to go to *Cincinnati* on business, which *West* believed. It further states, that while *West* was the journeyman of *Potter* he had frequently left home before, leaving *West* as his foreman and agent to transact his business in his absence; that when he last went away, he left with *West* several notes and other demands, to be collected and applied to the payment of his, *Potter's*, debts, as *West* was accustomed to do in *Potter's* absence; that some property was left in *West's* hands, a part of which he had caused to be taken on an execution against *Potter*, which issued upon a judgment against him, which *West* and another had replevied; that he had himself bid in the property fairly; that finding *Potter* did not return, and having assumed liabilities for him, he disposed of part of the property to discharge them, and claimed that *Potter* remained considerably in his debt after crediting him with all the property, choses in action, &c., which *West* had received of him.

To the answer of *West*, the complainants filed a general replication, averring that their bill was true.

The state of the accounts between the complainants and *Potter*, and also of those between *Potter* and *West*, including the whole amount of property received by the latter belonging to the former, and the disbursements made by *West* on account of *Potter*, were referred to a master in chancery. It appeared by his report, that *Potter* was indebted to the complainants in the amount claimed by them; and that *West* had received of *Potter* much more property than sufficient to pay them, and that he had, after *Potter's* departure, paid his debts to a considerable amount.

[*246] *The Circuit Court, founding their decree upon the report of the master, and taking no notice of the

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charge of fraud, decreed against *Potter* and *West*, to the amount of the complainants' debts against *Potter*. *West* appealed. By agreement of parties, all objection to the appeal on the ground of *Potter's* not joining in it is waived.

The real issue formed by the pleadings, was as to the existence of fraud on the part of *West*. There was no evidence in the cause, in our opinion, to establish the charge of fraud against him. The decree of the Circuit Court is therefore erroneous, as it neither conforms to the allegations of the bill, nor is supported by the testimony adduced. 7 Wheat. Rep., 522, *Crocket v. Lee*; 10 Ib., 181, *Carneal v. Banks*.

The whole case made out by the answer of *West*, the proof, and the master's report is simply this, that *Potter* was indebted to the complainants, that he left in *West's* hands property to an amount considerably more than sufficient to pay them, that he absconded and has not yet returned; that *West*, after his departure, bought in a large portion of the property on execution; that with part of the means which *Potter* left in his hands, he paid debts of the latter, and retains the balance on account of the indebtedness of *Potter* to himself. It is not for us to determine in this case, whether *West* is actually responsible to the complainants, at law, under the circumstances which exist. It is very evident, however, that if they have any remedy against him, it is legal and not equitable. As creditors seeking to liquidate and recover their debts against *Potter*, they have not brought themselves within the rule which entitles creditors to resort to a Court of equity. That rule is, that they must first have obtained judgment at law if they proceed against real property, and judgment and execution if they seek to reach personal property. There are some exceptions to this principle, but these complainants have not brought themselves within any of them. By the process of attachment, they might have seized all the property of *Potter* in *West's* hands, and by summoning the latter as garnishee, they might have secured any debt which he owed *Potter*. 4 Johns. Rep., 671; 2 Blackf., 356; Ib., 421.

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Per Curiam.—The decree is reversed with costs.
[*247] Cause *remanded, with instructions to the Circuit Court to dismiss the bill, &c.

J. Morrison, for the appellant.

C. Fletcher and *O. Butler*, for the appellees.

ADAMS, Administrator, v. EVANS, in Error.

WILSON obtained a judgment before a justice of the peace against *Evans*, and the defendant appealed to the Circuit Court. Whilst the appeal was pending, the suit abated by the death of *Wilson*. *Held*, that the administrator of the deceased might revive the suit.

Evans had filed before the justice, in the above-named suit, an account against *Wilson* as a set-off, which amounted to more than *Wilson's* demand; and on the trial in the Circuit Court (the suit having been revived, &c.), the jury gave a verdict in *Evans'* favour for a certain sum, without finding the amount of assets in the administrator's hands. *Held*, that the omission to find the amount of assets was not, in this case, any objection to the verdict.

ARMSTRONG v. THE STATE.

GAMING HOUSE.—Whether the circumstance of the defendant's permitting a roulette to be gambled upon once in his house, is *sufficient* evidence to support an indictment against him for keeping a room for gambling; is a proper question for the jury.(a)

RIGHTS OF JURY.—The jury to whom such a cause is submitted may determine the law as well as the facts.

(a) *Gaylor v. McHenry*, 15 Ind., 383; *Winemiller v. The State*, 11 Ind., 516; *Bepley v. The State*, 4 Ind., 264; *McAlpen v. The State*, 3 Ind., 567.

ERROR to the *Fayette* Circuit Court.

BLACKFORD, J.—Indictment against *Armstrong*. Two counts. One count charges the defendant with keeping a room to be used and occupied for gambling. The other, [*248] for renting a *room to another person to be used and occupied for that purpose. Verdict and judgment for the State.

The statute on the subject of this indictment is, that if any person shall keep a room, &c., to be used and occupied for gambling, or shall rent to another a room for that object, he shall be fined, &c.

The Court charged the jury, "That if it was proved that the defendant had permitted a roulette to be kept and gambled upon at any one time in any room in his possession, he was guilty under the first count of the indictment." This instruction ought not to have been given. The question before the jury was, whether the defendant occupied the room for gambling? That was purely a question of fact. If the defendant did so occupy his room, then the law said that he should be fined. To establish the charge, it was proved, as the instruction assumes, that the defendant permitted a roulette to be gambled upon, at one time, in his room. This was admissible evidence, which conduced to prove the fact which it was introduced to prove. But it was not conclusive evidence of that fact. It was for the jury to draw their own inference from the evidence, without any instruction from the Court, as to whether the defendant was or was not guilty of the offense charged.

An illustration of this doctrine may be drawn from the latter part of the statute in question. The statute, after saying that any person who shall rent a room to another to gamble in, shall be fined, enacts—that it shall be *sufficient* evidence that the room was rented for that purpose, if the owner, knowing that a gaming table is kept there, neglect to complain, &c. The consequence of this provision is, that when the evidence there mentioned is given, and the jury believe it, they must find the defendant guilty, and the Court

may so inform them. But if the statute were silent on the subject, the jury would not be bound by that evidence to convict the defendant, and it would be an error in the Court to inform them that they were so bound: the jury should be left free in this latter case, to determine for themselves. In the case before us, there is no law saying that the permitting of a gaming table to be played on, at one time, in a person's room, shall be *sufficient* evidence that he occupies the room for gambling. The jury, therefore, must be left at [*249] liberty to determine, from the *evidence of such permission either against the defendant or otherwise, as they may think proper.

The defendant asked the Court to instruct the jury as follows: 1st. "That a mere gambling in a room does not constitute the keeping of a room to be used for gambling within the statute, and in order to bring the case within the statute, there must be evidence that the room was kept generally for the purpose of gambling." 2d. "That if the defendant permitted persons to gamble in any part of his dwelling-house, on one occasion only, it would not render him liable under the statute for keeping a room or house to be used for gambling:" (it having been proved upon the trial that the roulette was used in the defendant's dwelling-house one evening only.) The Court correctly refused to give these instructions. Whether the facts stated in them were sufficient evidence or not to support the charge, was a question to be left to the discretion of the jury.

The defendant further asked the Court to instruct the jury, that they were judges of the law as well as of the facts in the cause, but the instruction was refused. This instruction ought to have been given. *Warren v. The State, May term, 1836.*

Per Curiam.—The judgment is reversed and the verdict set aside. Cause remanded, &c.

C. B. Smith, for the plaintiff.

W. Herod, for the State.

 Bryan v. Blythe and Another, Heirs, &c.

BRYAN v. BLYTHE and Another, Heirs, &c.

LIABILITY OF HEIR FOR DEBTS OF ANCESTOR.—The heir is not bound, in any case, for the debts of his ancestor beyond the amount of the assets descended.

PLEADING—MULTIFARIOUSNESS.—A bill in chancery, containing a claim against a defendant in his individual capacity and another against him as an heir for the debt of his ancestor, may be objected to for multifariousness; but the objection must be made before the defendant has answered the bill.

NO JURISDICTION—NO VALID JUDGMENT.—If a Court, either of law or of chancery, have no jurisdiction of the *subject-matter* in controversy, it can render no valid judgment or decree upon the merits of the cause.

VENDOR AND PURCHASER—WANT OF TITLE.—That the vendor of real estate has no title to the property, is a good defense to an action against the purchaser on a bond executed by him for the purchase-money, whether the suit be brought by the obligee or assignee of the bond.(a)

[*250] *THIS was a suit in chancery transferred from the *Marion Circuit Court* in consequence of the interest of the Circuit Judge.

BLACKFORD, J.—This is a suit in chancery brought by *John Bryan* against the heirs of *Samuel Blythe*, deceased. The bill states that *Bryan*, in the years 1814 and 1815, in *Nicholas county, Kentucky*, recovered against *Samuel Blythe* four several judgments, amounting in all to about \$3,000; that executions were issued on the judgments, but without effect; that *Samuel Blythe*, as a security for the payment of the judgments, assigned to the complainant a penal bond, executed by *Benjamin I. Blythe*, one of the defendants, to the assignor, for the payment of \$3,500, stating in the assignment that it was not to interfere with the collection of the judgments. The bill further states that *Samuel Blythe* died a short time before the filing of the bill, leaving the defendants his heirs at law; that no letters of administration have been granted on the estate; that the judgments remain unsatisfied; that *Benjamin I. Blythe's* residence was not, until recently, known to the complainant, and that the bond remains unpaid. Prayer, that the defendants may be decreed to pay the judgments, and for general relief.

(a) See cases cited in *Mix v. Ellsworth*, 5 Ind., 517.

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One of the defendants, *Benjamin I. Blythe*, answers the bill, and admits the rendition of the judgments and his execution of the bond to his father, *Samuel Blythe*, deceased. He states that the bond, with several others, was given in consideration of a tract of land in *Pennsylvania*, which the obligee conveyed to him by deed with general warranty; that this defendant took possession of the premises, except a small part, by virtue of the deed, but was soon afterwards evicted by a claimant under a paramount title; that, therefore, the consideration of the bond had failed. The answer of *Samuel Blythe*, the other defendant who is named in the bill, is similar to that of *Benjamin I. Blythe*. He says that his father died in the year 1830, leaving his brother *Benjamin* and himself, with one sister, his heirs at law. These defendants both deny that any property descended to them from their father.

One object of this bill, judging from its face, was to obtain from the heirs of *Samuel Blythe*, deceased, the amount of the judgments which had been obtained against him in his lifetime by the complainant. There is no averment in [*251] the bill, *however, nor is there the slightest evidence that any property descended to the defendants from their father, and the answers both deny the receipt of any assets whatever. This object of the bill, therefore, must fail. There is no rule of law more clear or more just than that the heirs are not bound, in any case, for the debts of their ancestor, beyond the amount of the assets descended. 2 Saund. Rep., 7, note (4).

The other part of the bill is nothing more than a claim by the complainant, as an assignee of a bond, against the defendant, *Benjamin I. Blythe*, the obligor. The demand here is against this defendant merely as an individual, for a debt of his own contracting, and ought not to have been united in the bill with the other demand against him as an heir, for the debt of his ancestor. The bill, in consequence of its containing both these demands, might have been objected to for multifariousness, but as the defendants have answered the bill, the objection

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to it merely for multifariousness can not now be made. *Ward v. Cooke*, 5 Madd., 122.

Another objection to this part of the bill is, that it shows plainly on its face that the complainant's remedy on the bond is exclusively at law. A Court of chancery has no jurisdiction in the case of a contract for the mere payment of money. *Brough v. Oddy*, 1 Tamlyn, 215. The assignee of a bond has the same right, by our law, to sue on it in a Court of law that the obligee has, and his remedy is confined to that Court. The complainant may suppose that, as this objection was not made by demurrer, it is too late to make it now. We think, however, that if a Court, whether of law or of chancery, have no jurisdiction of the *subject-matter* in controversy, it can render no valid judgment or decree upon the merits of the cause. The following language on the subject is used in a modern work on pleading: "It is a fatal objection to the jurisdiction of any Court that it has not cognizance of the *subject-matter* of the suit; that is, that the nature of the action is such as the Court is, under no circumstances, competent to try: as if a real action were brought in the King's Bench, or a cause, exclusively of *admiralty* jurisdiction, in any Court of common law. In any such case, neither a plea to the jurisdiction, nor any other *plea*, would be *necessary* to oust the jurisdiction of the Court. The cause might be dismissed on motion; and even without motion, it would be the [*252] duty of the Court to *dismiss it ex officio*, for the whole proceeding would be *coram non judice*, and utterly *void*." Gould on Plead., 236. And, in a suit in chancery, Lord *Hardwicke* says "that a Court of equity, which can exercise a more liberal discretion than common law Courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree than where a plain want of equity appears." *Penn v. Lord Baltimore*, 1 Ves. Sen., 444.(1) From this view of that part of the cause which respects the claim on the bond, it is evident that, as a Court of chancery, we could not render a decree for the complainant, though the defense relied on were not proved.

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But if this objection as to the jurisdiction of the Court did not exist, we could not sustain the complainant's demand on the bond. The defense, founded on a failure of consideration, is clearly made out by the evidence on the record. *Samuel Blythe*, the obligee, had no title to the land, in part consideration of which the bond was given: that point was settled, after the execution of the bond, by the Supreme Court of *Pennsylvania*, where the premises are situated. Such a defense by the purchaser, in an action against him on a bond given for the purchase-money, is decided to be valid in the case of *Leonard v. Bates*, May term, 1822. And the statute gives the obligor the same defense, existing before notice of the assignment, in an action against him by the assignee, that he would have had if the suit were by the obligee. Rev. Code, 1831, p. 94.(2)

Per Curiam.—The bill is dismissed, but without costs.

C. Fletcher and *O. Butler*, for the complainant.

J. Morrison, for the defendants.

(1) Accord. *Cummins v. White*, in this Court, November term, 1837. *Contra*, *Underhill v. Van Cortlandt*, 2 Johns. Ch. R., 339, and *Livingston v. Livingston*, 4 Id., 287. The Circuit Court of the *United States*, third circuit, disapproves of these *New York* cases, and says that an objection to the jurisdiction of a Court of chancery, or to the want of equity in the bill, can not be overruled for the want of a demurrer or plea, but must be sustained whenever the defect appears, by the bill, the answer or the proofs in the cause. *Baker v. Biddle*, 1 Baldw., 394.

(2) Accord. Rev. Stat., 1838, p. 119.

[*253] *DICKERSON v. TYNER, Administrator.

ARBITRATION AND AWARD—SUIT ON AWARD—PLEA.—To an action on an award, the defendant pleaded that there was no such award as alleged. *Held*, that, by the statute, the plea should be sworn to.

SAME.—If when a suit is pending, the parties, by their bond, submit the cause to arbitration, the successful party is not confined to the statutory remedy of having the award made the judgment of the Court; but he may sue on the award.(a)

(a) *Coats v. Kizer*, 14 Ind., 179.

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FORM OF AWARD.—An award that one of the parties shall pay to the other a certain sum of money, can not be objected to as not being final.

SAME.—Arbitrators may, by virtue of the statute, award the costs of the reference, though the agreement to submit be silent on the subject.

EXECUTORS AND ADMINISTRATORS.—An executor or administrator may maintain an action on an award, though the matters submitted arose out of tort.

ERROR to the *Hancock* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by *Tyner*, administrator of *Hays*, against *Dickerson*. The declaration contains four counts. The first count, which is on an award, states that *Hays* and *Dickerson*, in order to settle and determine two suits, which were pending between them, referred the same to arbitration; that the arbitrators awarded that *Dickerson* should pay *Hays* the sum \$434, together with the costs of arbitration, amounting to \$12.66; and that for the non-payment of the money awarded, the action is brought. The other counts are for money had and received, money paid, and on an account stated.

To the first count the defendant pleaded four pleas. 1. That there was no such award as alleged. 2. That the intestate and the defendant had, by an arbitration-bond, submitted the matters in difference to arbitration; that the award, according to the condition of the bond, was to be made the judgment of the Court; that no judgment had been rendered on the award, &c. To the second, third and fourth counts *nil debet* was pleaded. There was also a plea of payment as to a part of the amount for which the suit was brought.

The first plea to the first count was set aside on the defendant's motion, because it was not sworn to. As the award is the foundation of the action, the statute requiring certain pleas to be sworn to, may be considered as embracing this case. Rev. Code, 1831, p. 403; *Titus v. Scantling and Wife*, May Term, 1834.

[*254] *The second, third and fourth pleas to the first count were demurred to and the demurrer sustained. These three pleas are of the same character. The question

raised by them is, whether when a suit is pending, and the parties by their bond submit the cause to arbitration, the successful party can sue on the award? It is contended that the award, in such case, can only be enforced by having it made in conformity with the statute, a judgment of the Court. Rev. Code, 1832, p. 72. This doctrine is not tenable. The Legislature has not limited the party to this statutory proceeding. He has the same right now that he ever had, to maintain an action on the arbitration-bond or on the award. The statute of 9 and 10 Will., 3, authorized the parties in an arbitration-bond to insert an agreement that their submission should be made a rule of Court; but it has never been considered that the statute, by that provision, prevented the parties to such an agreement from proceeding at common law, for the non-performance of an award, by an action on the bond or on the award. 2 Tidd's Prac., 745; 2 Chitt. Gen. Prac., 122. The same may be said with regard to our statute. If the arbitration-bond authorize it, the party may have the agreement to submit made a rule of Court, and may have the award made a judgment of the Court. But that is not his only remedy for a non-compliance with the award. If he prefer it, the successful party may still resort to the remedy at common law, and sue on the award or on the bond. For these reasons, we conceive that the matters set out in the second, third and fourth pleas to the first count, are no defense to that count; and that the demurrer to those pleas was correctly sustained.

Upon the pleas of *nil debet* and payment filed in this cause, issues were joined by the plaintiff. The determination of these issues was submitted to the Court, and a judgment was rendered in favour of the plaintiff for the sum of \$447.66, in debt; with \$13.34 in damages, in all \$461, together with the costs of suit. This judgment, the defendant contends, is not supported by the evidence, the whole of which is set out in the record.

The award upon which the first count in the declaration is founded, and which was introduced as evidence by the plaintiff, is objected to by the defendant because it does **not**

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require the plaintiff to dismiss the suit, nor to execute [*255] a release to the *defendant. The ground of this objection is, that the award does not put a final end to the matters submitted. The award, after reciting that the matters mentioned in arbitration-bond thereto annexed, had been submitted to the arbitrators, states that *Dickerson* should pay *Hays* for his damages sustained, the sum of \$434, &c. This award is certainly final. It may be pleaded in bar to any subsequent suit on the original causes of action. There are cases in point in support of the award against this objection. It is decided, that if an award on the subject of trespasses be, that the party shall pay ten pounds for all trespasses done to the plaintiff by the defendant, it is good. *Ormelade v. Coke*, Cro. Jac., 354. There is another case where an action of trespass was referred, and the arbitrators awarded that the defendant should pay the plaintiff five shillings for his making the first breach in the law. It was objected that this award was not mutual and final, but the objection was overruled. *Hawkins v. Colclough*, 1 Barr., 274.

Another objection made to the award is, that the costs of the reference ought not to have been awarded, as the submission-bond gave the arbitrators no authority over those costs. It is true that, by the *English* law, arbitrators can not award the costs of the reference, unless the instrument by which they are appointed expressly authorizes them to do so. *Candler v. Fuller*, Willes, 62; *Taylor v. Gordon*, 9 Bingh., 570. A contrary opinion is expressed in *Strang v. Ferguson*, 14 Johns., 161, but that opinion is believed to be incorrect. It appears to us, however, that our statute may be considered as authorizing the costs of the reference to be awarded, though, as in the present case, the agreement to submit is silent on the subject. Rev. Code, 1831, p. 73.

We have examined the other evidence, as well as the award, and are satisfied that it is sufficient to sustain the judgment.

There is one other error assigned which remains to be noticed. It is, that as *Hays* died before judgment on the award, the money awarded to him could not be recovered. This

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objection is without foundation. The award was made in the life-time of *Hays*, and it became a new cause of action founded on contract. The law is stated, in general terms, that an executor or administrator may maintain an [*256] action on an award; *Cald. on Arb., 153; and it must be the same thing, whether the matters submitted arise out of contract or tort. In the case before us, the original causes of action, one of which was trespass, were merged in the award. The money awarded was due to *Hays* in his life-time, and his administrator had a right to recover it by an action of debt.

Per Curiam.—The judgment is affirmed with three *per cent.* damages and costs.

J. B. Ray, for the plaintiff.

C. Fletcher and *O. Butler*, for the defendant.

THE BOARD OF COMMISSIONERS OF GRANT COUNTY v. THE BOARD OF COMMISSIONERS OF DELAWARE COUNTY.

ILLEGAL TAXES—RIGHTS OF PARTIES.—A county that has illegally collected taxes in another, is liable for the money to the individuals from whom it was collected, but not to the latter county itself; and a statute passed subsequently to the collection, directing the county first above named to pay the money to the other, can not affect the right and liabilities of the parties.

SAME.—A county order, issued under these circumstances by the county which had made the collection in favour of the other county, is without consideration.

ERROR to the *Delaware* Circuit Court.

BLACKFORD, J.—Assumpsit by the board of commissioners of the county of *Grant* against the board of commissioners of the county of *Delaware*. The declaration contains two counts.

According to the first count, the defendants made an order that their clerk should issue a county order in favour of the

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plaintiffs, for a certain amount due to them for taxes, which the collector of *Delaware* county had collected in the county of *Grant*, the order to be paid out of any money in the treasury not otherwise appropriated. The clerk, accordingly, drew the order, but the treasurer refused to pay the amount for want of funds. The consideration of the order to the clerk, made by the defendants, was, that the collector of their county had collected certain county taxes within the bounds of *Grant* county, and that the Legislature had passed an act [*257] *requiring these taxes to be paid by the county of *Delaware* to *Grant* county. This count was demurred to and the demurrer sustained.

The second count is a general one for money had and received, to which the defendants pleaded the general issue. The trial of this issue was submitted to the Court.

The following are the facts: By an act of the Legislature, approved the 10th of *February*, 1831, it was enacted that from and after the 1st of *April*, in that year, a certain tract of country should form a new county by the name of *Grant*. The board of commissioners of *Delaware* county, at the *January* term, 1831, appointed an assessor of taxes for the county of *Delaware*, and the assessor, by virtue of this appointment, assessed the property of the citizens within the territory which was to form the new county of *Grant*, but which was then attached to the county of *Delaware*. The board of commissioners of *Delaware* county, at the *May* term, 1831, appointed a collector of taxes, and he collected the State and county revenue which had been assessed within the bounds of *Grant* county, and paid the amount into the treasury of *Delaware* county. The Legislature, by an act in *January*, 1832, directed that the board of commissioners of *Delaware* county should pay to the board of commissioners of *Grant* county, the county revenue of 1831, which the collector of *Delaware* had collected in the county of *Grant*. The board of commissioners of *Delaware* county, in consideration of the circumstances which we have enumerated, authorized their clerk to issue a county order in favour of the board of com-

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missioners of *Grant* county, for the amount of the county revenue which had been collected in the county of *Grant*, to be paid out of any money in the treasury not otherwise appropriated. This order was accordingly issued, and was presented for payment to the treasurer of *Delaware* county, on whom it was drawn, but payment was refused for want of funds.

The Circuit Court, upon this evidence, gave judgment for the defendants.

There appears to be very little difficulty in this cause. The correctness of the judgment on the demurrer to the first count of the declaration, and on the evidence given under the second count, depends on the same question. That question is, did the money which, under the assessment authorized by [*258] the *board of commissioners of *Delaware* county, was collected by their collector from the people of *Grant* county, belong to the county of *Grant*? It is clear that *Grant* county had no claim whatever to this money. It was not assessed or collected for the benefit of that county nor under its authority. If the money was illegally collected, it is the individuals from whom it was collected that are injured, and not the county of *Grant*. The contract therefore of the defendants, evidenced by the county order, to pay the plaintiffs the revenue in question, is without consideration and can not be enforced.

The act of the Legislature of 1832, passed subsequently to the collection of the revenue claimed by *Grant* county, can not affect the rights or liabilities which that collection created.

The question, whether the defendants had a right to inquire into the consideration of the county order, does not belong to the cause. The plaintiffs, in the first count of the declaration, set out the consideration of the order, and the evidence respecting the consideration of it was not objected to on the trial.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

J. Rariden and *J. S. Newman*, for the plaintiffs.

· *C. B. Smith*, for the defendants.

Dentler, Claimant, &c. v. The State.

DENTLER, Claimant, &c. v. THE STATE.

TAX TITLE—WHAT RECORD MUST SHOW.—The motion of a prosecuting attorney, under the statute of 1835, for judgment that the title to a lot or tract of land be vested in the State for the non-payment of taxes, will not be granted, unless it appear, *inter alia*, that notice of the motion has been published conformably to the statute.(a)

• ERROR to the *Marion* Circuit Court.

BLACKFORD, J.—It is stated by the record of this cause, that at the *May* term of the *Marion* Circuit Court, 1836, and on the sixth day of the term, the prosecuting attorney filed a list of the lands and lots in the county, on which the taxes for the year 1832 had not been paid. In this list, lot number six in square 51 is described. The school commissioner's [*259] certificate, *attached to the list, states that the list contains a correct description of the lands and town lots on which the taxes remain unpaid, and that the list was advertised in the *Indiana Journal*, and by printed advertisements attached to the court house door in *Indianapolis*, for four weeks before the *May* term of the Circuit Court in 1836.

It is stated that the prosecuting attorney, on the sixth day of that term, made a motion, founded on this list of lands and lots, that lot number six mentioned in the list, and there described as the property of a person unknown, should vest in the State.

It is also stated that the Court, being satisfied that all the proceedings required by law in relation to the lot had taken place, adjudged and decreed that the lot should vest in the State, for the use of common schools in *Marion* county.

Since the rendition of that judgment, *William Dentler* has filed an affidavit, stating that the lot belongs to him, and has, as a party injured by the judgment, sued out a writ of error.

The statute of 1832 requires that the collectors of revenue shall annually deliver to the school commissioners a description of the lands and lots on which the taxes are unpaid, and that

(a) *Smith v. The State*, 5 Blackf., 65.

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if any of the lands are not redeemed for three years, the same may, to increase the school fund, be sold in such manner as the Legislature shall prescribe. Acts of 1832, page 264. The statute of 1835, in furtherance of that of 1832, directs the manner in which the commissioner must proceed in order to have the title of the unredeemed lands or lots vested in the State. It is required, among other things, that a list of the lands be advertised, and that the notice thus given express that unless the taxes, &c., be paid before the next term of the Circuit Court, a motion will be made for a judgment that the lands be vested in the State. Acts of 1835, page 37.

As this is a summary and *ex parte* proceeding, the greatest strictness on the part of the plaintiff is required. The record must show that the steps prescribed by the statute to be taken before the motion for judgment is made, have been regularly taken. The record before us is, in this respect, defective. It does not appear that the publication contained any notice that the motion for judgment would be made at the next term of the Court. Such a notice should have been inserted in the advertisement of the delinquent list. The record, it [*260] is true, *states that the Court was satisfied that all the proceedings required by law had taken place. But that amounts to nothing. The record must show what those proceedings were, in order that an appellate Court may have an opportunity to determine whether they are all which the statute requires to give the Circuit Court jurisdiction. "In summary proceedings," says Chief Justice *Marshall*, "where a Court exercises an extraordinary power under a special statute prescribing its course, that course ought to be exactly observed, and those facts especially which give jurisdiction ought to appear, in order to show that its proceedings are *coram judice*." *Thatcher v. Powell*, 6 Wheat., 119.

Per Curiam—The judgment is reversed, and the proceedings subsequent to the filing of the delinquent list set aside. Cause remanded, &c.

J. Morrison, for the plaintiff.

W. Herod, for the State.

Wallace v. Vigus.

WALLACE v. VIGUS.

CARRIER—BILL OF LADING—EVIDENCE—LOW WATER—MEASURE OF DAMAGES.—The declaration in assumpsit against a common carrier by water, was for the non-delivery of a certain quantity of salt and steel, which he had received to be carried, &c. *Held*, that a bill of lading in which the defendant acknowledged the receipt, not only of the salt and steel, but also of certain other articles, was not objectionable as evidence on the ground of variance.

Held, also, that as the suit was for the non-delivery of the goods, and was not brought until two years after the defendant had received them, it was no defense to the suit that the river, on which the goods were to be carried, was, for four months after they were received, too low for the navigation of the defendant's boat.

Held, also, that the measure of damages in such case, if the plaintiff succeed, is the wholesale value of the goods at the place at which they were to be carried, deducting the price of freight.(a)

ERROR to the *Vigo* Circuit Court.

BLACKFORD, J.—*Vigus* sued *Wallace* in assumpsit for the non-delivery of goods, which, as a common carrier, the latter had undertaken to carry by water from *Cincinnati* to *Tiptonsport*, on the *Wabash* river. The declaration states that the defendant, being master and commander of the steam-
[*261] boat **Lafayette*, lying at *Cincinnati*, received on board there from the plaintiff divers goods, viz.: sixty-three barrels of salt, of the value of \$500, and five hundred pounds of steel, of the value of \$200; that the defendant, in consideration of certain freight to be paid him, undertook to carry the goods safely to *Tiptonsport* without delay (the dangers of the river and unavoidable accidents only excepted); that though a reasonable time had elapsed, and the delivery of the goods has not been prevented by the dangers of the river, &c., yet the goods have not been delivered, &c. To the plaintiff's damage, \$1,000. The defendant pleaded non-assumpsit. Verdict in favor of the plaintiff for \$429, and judgment on the verdict.

On the trial the plaintiff offered in evidence the bill of lading, which the defendant objected to. The bill of lading

(a) See *Gutling v. Newell*, 12 Ind., 118.

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acknowledges the receipt of several articles besides the salt and steel mentioned in the declaration, and it was therefore objected to on the ground of variance. The Court correctly overruled the objection. There is not, in the declaration, any description of the bill of lading, by which the plaintiff's proof was to be confined. The complaint is for receiving the salt and steel and not delivering them at the place to which they were to be carried. The bill shows the defendant's receipt of those things, and that is all the plaintiff introduced it to prove. It shows, to be sure, the receipt also of other articles, but that is no objection to its admission. The other articles may have been carried and delivered according to the contract; at any rate, the plaintiff makes no complaint respecting them. The remarks of Justice *Buller*, in the case of *Baptiste v. Cobbold*, 1 Bos. & Pull., p. 7, are in favor of the admission of this evidence. There is no written contract described, and the proof agrees with the declaration as far as the declaration goes.

After the defendant had given some testimony relative to the low state of the *Wabash* river in the spring of 1833, the plaintiff offered to prove that, from *March* until *July* of that year, keel-boats could pass from the rapids below *Vincennes* up to *Tiptonsport*. This evidence was objected to, but the Court admitted it. We shall not stop to inquire whether this evidence was admissible or not; for supposing it not to be admissible, there was proof enough without it to authorize the verdict for the plaintiff. Two years had elapsed from
[*262] the time the *goods were shipped before this suit was brought. The non-delivery of the goods is the breach assigned. The defendant received the goods at *Cincinnati*, on board of his steamboat, and undertook to carry them to *Tiptonsport*, and there deliver them to the plaintiff. The goods were never delivered. The defendant proves that from *March*, 1833, when he received the goods, until *July* following, the *Wabash* river was not high enough to enable him to get up to *Tiptonsport* in his steamboat; and on this evidence he relies for his justification, not merely for any delay in delivering the goods, but for his not having delivered them at all, although two

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years had elapsed from the time he received them. The evidence is no defense to the action.

The case presents but one other question. The Court instructed the jury that if they found for the plaintiff, the measure of damages should be the wholesale value of the articles at *Tiptonsport*, deducting the price of freight. We see no objection to this instruction. The ground of action is, that the defendant had received the goods as a common carrier, to be safely delivered to the plaintiff at *Tiptonsport*; but that the goods, without any legal excuse, had not been delivered. Under these circumstances, if they are true, the defendant is bound to pay for the goods. The only question is, whether the jury were to be governed by the value of the property at *Cincinnati* or at *Tiptonsport*? This question is settled by authority, in conformity with the opinion expressed by the Circuit Court. 2 Kent's Comm., 2d ed., p. 600, and the authorities there cited.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

J. Whitcomb, for the plaintiff.

J. Farrington and *S. B. Gookins*, for the defendant.

[*263] *DOE, on the Demise of WILKINS, v. RUE and Others.

EXECUTION—SALE ON—AMENDMENT OF.—If land be sold on execution which, as to the amount, varies from the judgment, the purchaser or person claiming under him may have the execution amended by the judgment.^(a)

SEPARATE JUDGMENTS.—One execution can not be issued upon two separate judgments.

UNREVERSED JUDGMENT—EVIDENCE.—A judgment which is unreversed can not be objected to as evidence, merely because it is erroneous. *Aliter*, if it be a nullity.^(b)

(a) *Hatchens v. Doe*, 3 Ind., 528.

(b) *Cornwell v. Hungate*, 1 Ind., 156; Id., 296.

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SHERIFF'S DEED—EVIDENCE.—A sheriff's deed may be admissible as evidence, though it recite incorrectly the amount of the execution under which the sale was made; a particular recital of the execution not being necessary to the validity of the deed.

DEMURRER TO EVIDENCE.—On a demurrer to evidence, the facts and conclusions which the evidence conduces to prove are admitted; and the Court may draw from the evidence every inference which a jury could have reasonably drawn from it.

JUDICIAL SALE—LAPSE OF TIME.—Upon an execution for eighty dollars, the sheriff sold a quarter section of land for \$567, and conveyed the same to the purchaser. Ten years afterwards, the execution-defendant, without showing any cause for his delay, objected to the sale for having been so made. *Held*, that the sale, under these circumstances, might be considered on a demurrer to evidence, to have been made in good faith.

ERROR to the Wayne Circuit Court.

BLACKFORD, J.—This was an action of ejectment for a quarter section of land in *Wayne* county. Plea, not guilty; and judgment for the defendants.

The defendants moved to amend two executions against *Wilkins*, the lessor, under which, with another, the land in dispute had been sold by the coroner, and purchased by *William Reniston*, under whom the defendants claimed. This motion was granted, and the executions were accordingly amended. The making of these amendments is assigned for error.

The first execution which was amended, was in favour of *Barker* against *Wilkins* for \$25.06. The judgment on which this execution issued, was for \$24.34. The execution was amended so as to make the amount correspond with that of the judgment. We can see no objection to this amendment. The defendants were interested in the validity of the coroner's sale; because, if the sale was valid, the title to the premises was not in *Wilkins*, and he could not, therefore, recover in this action. The error in the amount of the execution was only a misprision of the clerk, and was amendable by the judgment. 2 Tidd's Prac., 643; 2 Arch. Prac., 279; Graham's Prac., 538; *Bissell v. Kip*, 5 Johns., 89; *Brown v. Betts*, 13 Wend., 29.

[*264] *The other execution which was amended, was in

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favour of *Asa Jeffries* and *John Smith* against *Wilkins* for \$314.99, together with \$9.86 as costs. This execution was amended, so as to require the coroner to make \$127.03 recovered by *Jeffries*, and \$187.96 recovered by *Smith*, and also to make the sum of \$9.86 recovered by the plaintiffs for their costs. This amendment, it appears to us, has not made the execution any better than it was before, and the plaintiff, therefore, need not complain of it. The judgments in favour of *Jeffries* and *Smith* are not joint but several, and they are no authority for the execution under consideration. We shall notice this again, when we come to speak of the admission of this execution in evidence.

After these executions had been amended, a jury was impaneled to try the cause.

The defendants admitted on the trial, that the lessor of the plaintiff was the owner in fee-simple, in 1824, of the premises in controversy; and that he was still the owner of the same, unless the defendants could show a paramount title.

The first evidence offered by the defendants to show their title, was two judgments against *Wilkins*, the lessor; one of them in favour of *Jeffries*, and the other in favour of *Smith*. The record of these judgments was objected to as evidence, but the objection was overruled. These judgments are in cases of attachment. The objections to their admission are, that the record does not show that bonds were filed; that, in one of the cases, no affidavit appears to have been made, and in the other, that the affidavit was made too long before the issuing of the writ; that, in one case, the only description of the cause of action is in the affidavit; and that there is not, in either case, any order for the sale of the property attached. Objections like these, not showing the judgments to be nullities, could not exclude the record as evidence. The force of such objections, whatever it may be, can only operate in cases of appeal and writs of error.

The next evidence offered by the defendants, was two judgments against *Wilkins* in favour of *Barker*. These judgments were admitted. It is said that their admission was objected

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to in the Court below, but the objection is not urged here.

The execution of *feri facias* in favour of *Asa* [*265] *Jeffries* and **John Smith* against *Wilkins*, which we have already noticed, was offered in evidence by the defendants. This execution, which was issued upon the two judgments in attachment to which we have referred, was objected to as evidence, but it was admitted. The Circuit Court here committed an error. The two judgments—one in favour of *Jeffries* for \$127.03, the other in favour of *Smith* for \$187.96—are entirely distinct, and have no dependence on each other. The execution in question could not issue upon these several judgments. The variance is fatal.

The defendants further offered in evidence two executions against *Wilkins* in favour of *Barker*. This evidence was objected to in the Circuit Court, but it was admitted. The objection is now correctly abandoned. One of these executions, it is true, had issued for a small sum more than the judgment, but the variance had been obviated by an amendment.

The last evidence offered by the defendants, was the coroner's deed for the premises to the purchaser under the executions against *Wilkins*. This deed recites the execution in favour of *Jeffries* and *Smith*, and the executions in favour of *Barker*. The recital agrees with the executions as they were issued; but as two of them had been subsequently amended, there was as to these a variance in the recital. This variance was insisted upon as an objection to the admission of the deed in evidence, but the Circuit Court overruled the objection. This objection is without foundation. One of the executions in *Barker's* favour, was issued in conformity with the judgment. That execution was not amended, and it is correctly recited in the deed. The execution in favour of *Jeffries* and *Smith* is, as we have before stated, not admissible evidence under the judgments in their favour; and the recital in the deed of that execution is, therefore, merely surplusage. The other execution in favour of *Barker* is for \$24.34; but it is stated in the recital of the deed to be \$25.06. Here is a slight variance; but the objection to the deed as evidence, on that

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ground, is not sustainable. A particular description of the execution is not required in the recital of a sheriff's deed; and such mistakes, therefore, in the recital, as the one we have just mentioned, do not affect the validity of the deed, or create any objection to its admission as evidence. It [*266] is not necessary to dwell upon this point, *as it is settled by authority. *Jackson*, dem. *Martin et al.* v. *Pratt*, 10 Johns. Rep., 381; *Jackson*, dem. *Witherell et al.* v. *Jones*, 9 Cowen's Rep., 182; *Sneed v. Reardon*, 1 Marsh. Ky. Rep., 217.

There is one question more in this cause to be considered. That question relates to the decision of the Circuit Court, in favour of the defendants, on a demurrer to their evidence; leaving out of our view the execution in favour of *Jeffries* and *Smith*. The plaintiff admits on the record, that defendants have legal conveyances from the purchaser at the coroner's sale; so that the only question for the decision of the Circuit Court on the demurrer, was, whether the coroner's sale could, under the circumstances, be considered valid? The amount to be collected on the executions in favour of *Barker*, according to the endorsements on them, was about eighty dollars. The premises, viz: a quarter section of land, sold for \$567. The sale was about ten years before the suit was commenced. This is the substance of the testimony relative to the sale. By the demurrer, the facts and conclusions which the evidence conduced to prove were admitted; and the Court had a right to draw from the evidence every inference which a jury could reasonably have drawn from it. *Gibson v. Hunter*, 2 Hen. Bl. Rep., 187; *The Columbian Insurance Company v. Catlett*, 12 Wheat. Rep., 383, 389. The Circuit Court, in overruling the demurrer, have determined the sale to be valid; and we are not disposed to disturb that decision. There is nothing in the evidence, which could have prevented a jury from inferring from it, that the sale was in good faith. Indeed, it appears to us that the fact, unexplained as it is, that the plaintiff permitted ten years to elapse from the time of the sale and conveyance, before he thought proper to complain, conduced

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to prove that he was satisfied with the sale, and that it was not fraudulent.

Per Curiam.—The judgment is affirmed, and judgment for costs against the lessor of the plaintiff.

O. H. Smith and J. S. Newman, for the plaintiff.

J. Rariden, for the defendants.

[*267] *HARRIS v. THE MUSKINGUM MANUFACTURING COMPANY.

CORPORATION—SUIT BY—PLEADING.—The declaration in a suit brought in a corporate name need not aver the plaintiffs to be a corporation.^(a)

RELEASE BY MEMBER OF A CORPORATION.—The circumstance that a person is a member of an incorporated company gives him no authority to release a debt due to the corporation.

DISSOLUTION OF CORPORATION—PLEA OF.—A plea to a suit by a corporation, stating that the corporation had been dissolved by the acts of its members, without showing the causes and manner of the dissolution, is insufficient.

VARIANCE.—In a suit against *Elisha Harris*, alias *Elisha B. Harris*, a judgment against *Elisha Harris* was objected to as evidence on the ground of variance. *Held*, that the objection was untenable.

SUIT ON JUDGMENT—DECLARATION.—If, in a suit on a judgment, the declaration set out the amount of the judgment correctly, the circumstance that the sum named in the *queritur* is less than the judgment, is not material.

JUDGMENT BY DEFAULT.—A judgment can not be taken against the defendant by default if there are pleas in bar on file upon which issues are joined.^(b)

ERROR to the *Allen Circuit Court*.

BLACKFORD, J.—*The Muskingum Manufacturing Company* brought an action of debt against *Harris*. The declaration is, substantially, as follows:

The Muskingum Manufacturing Company complain of *Elisha Harris*, otherwise *Elisha B. Harris*, in custody, &c., of a plea that he render to the plaintiffs the sum of \$1,274.87, which he owes, &c. For that whereas the plaintiffs, on, &c., at, &c.,

^(a) *Richardson v. St. Joseph Iron Co.*, 5 Blackf., 146; *O' Donald v. The Evansville, etc., Co.*, 14 Ind., 259; *Heaton v. The Cincinnati, etc., R. R. Co.*, 16 Ind., 275; 18 Id., 237; 23 Id., 274.

^(b) *Kirby v. Holmes*, 6 Ind., 33; 1 Id., 477; 5 Blackf., 571.

Harris v. The Muskingum Manufacturing Company.

recovered against said *Elisha B. Harris* \$1,274.87 above demanded, adjudged as their damages, and the sum of \$11.49 for their costs. Whereby an action has accrued to the plaintiffs to demand of the defendant the said sum of \$1,274.87, as also the sum of \$11.49 costs, above demanded. And it is averred that the defendant in that cause is the defendant in the present suit. Damages, \$1,500.

The defendant pleaded five pleas: 1st, payment; 2d, accord and satisfaction; 3d, that *Nathaniel Wilson*, one of *The Muskingum Manufacturing Company*, in consideration of a farm, &c., released the defendant from the debt, which release is lost; 4th, that since the judgment the corporation was dissolved by the consent and acts of its members; 5th, *nul tiel record*. To the first and second pleas there are replications in [*268] denial. The third and fourth pleas were demurred *to, and the demurrers were sustained. To the fifth plea, the plaintiffs replied that there was such a record as stated in the declaration. The issue on the plea of *nul tiel record* was tried by the Court, and decided in favour of the plaintiffs. On the other issues, the defendant made default.

The final judgment in favour of the plaintiffs is for \$1,286.36 in debt, and \$1,086.95 in damages for the detention of the debt, amounting in all to the sum of \$2,373.31, together with costs.

The first objection to these proceedings is that the declaration is insufficient. It is said that the declaration ought to have averred that the plaintiffs were a corporation, and to have shown how they were incorporated. There is no ground for this objection. The name itself implies that the plaintiffs are a corporation. *Norris v. Staps*, Hobart, 211. If the plaintiffs were not authorized to sue by the name which they have assumed, the defendant could have denied their existence by a special plea. *The Guaga Iron Company v. Dawson*, decided at this term. The declaration before us, so far as regards the objection in question, is in the usual form. *Dean and Chapter, of Rochester v. Pierce*, 1 Camp., 466; *United States' Bank v. Haskins*, 1 Johns. Cas., 132.

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The judgment sustaining the demurrer to the third plea is objected to, but without cause. The circumstance that the person named in the plea was one of the company, gave him no authority to release a debt due to the corporation.

It is contended that the demurrer to the fourth plea should have been overruled, but we are not of that opinion. The plea that since the judgment declared on the corporation had been dissolved is an affirmative plea, and the causes and manner of the dissolution ought to have been shown. To say merely, as this plea does, that the corporation had been dissolved by the consent and acts of its members, is not sufficient. A corporation can not be dissolved by the consent of its members, except it be by the surrender of their franchise to the Government, and an acceptance by the Government of the surrender. But this plea shows no such surrender and acceptance, and is consequently bad. 2 Kent's Comm., 310.

On the trial of the issue on the plea of *nul tiel record*, the plaintiffs offered in evidence a transcript of the judgment on which the suit was founded. The evidence was objected [*269] to *on the ground of variance, but the objection was overruled. The present suit was brought against *Elisha Harris*, otherwise *Elisha B. Harris*, and the judgment given in evidence is against *Elisha Harris*. It is said that there is a variance here as to these names, but we do not think the objection is tenable. It is also said that the judgment given in evidence does not agree, as to the amount of the debt, with the judgment declared on. In this the defendant is mistaken. The body of the declaration shows the amount recovered in *Ohio* to be \$1,274.87 damages, and \$11.49 costs. The transcript admitted in evidence agrees with that statement. The circumstance that the sum demanded in the *queritur* of the declaration is for a less amount, is not material. *Lord v. Houstoun*, 11 East, 62.

There is, however, an error in these proceedings for which the judgment must be reversed. There are two pleas to the action, viz., payment and accord and satisfaction, upon which issues were joined by the plaintiffs. These issues have not been

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tried. A judgment could not be taken by default over these pleas. When the defendant was called and failed to appear, the only course for the plaintiffs to take was, to have a jury impaneled to try the issues on these pleas, in the same manner as if the defendant had appeared and defended the cause. 2 Arch. Prac., 28; Graham's Prac., 631.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the entry of the defendant's default set aside, with costs. Cause remanded, &c.

C. W. Ewing, J. S. Newman and D. H. Colerick, for the plaintiff.

H. Cooper and S. C. Sample, for the defendants.

THE STATE, on the Complaint of S. BELL v. ALLEN.

BASTARDY—ERROR IN JUSTICE'S TRANSCRIPT.—A justice's transcript in a case of bastardy, stated that the justice had adjudged the defendant to be the father of the child, and had recognized him to appear in the Circuit Court; but it omitted to state that the defendant had failed to compensate the mother. *Held*, that the Circuit Court ought not, for that omission [*270] in the transcript, to discharge the defendant from his *recognizance. *Held*, also, that if the compensation had been made, bond given, &c., the same might be pleaded in the Circuit Court in bar of the accusation.

AFFIDAVIT OF MOTHER TO BASTARD.—The mother's affidavit in such case need not state that she is resident in the county, or that the child was born there, or that it is alive. (a)

RECOGNIZANCE, FORFEITURE OF.—After the defendant's discharge from his recognizance, in such case, it is too late for a motion, on the part of the State, to have the recognizance forfeited.

ERROR to the Clinton Circuit Court.

BLACKFORD, J.—This is a case of bastardy, certified by a justice of the peace to the Circuit Court.

The transcript of the justice states that *Sarah Bell*, an unmarried woman of *Clinton* county, on the 20th of *September*,

(a) *Beeman v. The State*, 5 Blackf., 165; *Neff v. The State*, 3 Ind., 564.

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1834, made oath before him that she had been delivered of a bastard child on the 13th of *June* preceding, and that *Jesse Allen* was the father of the child. The transcript also states that, upon this accusation, a warrant issued against *Allen*, who appeared and denied the charge; and that after the complainant had been examined by the justice and cross-examined by the defendant, the justice adjudged the defendant to be the father of the child. The transcript also states that the justice bound the defendant in a recognizance for his appearance at the next term of the Circuit Court to answer the accusation.

The Circuit Court, on the defendant's motion, discharged the defendant from the recognizance.

The first ground taken by the defendant to sustain the judgment below is, that the justice's transcript does not show that the defendant, after the justice had decided against him, failed to compensate the complainant, &c., as prescribed by the statute. This position is not tenable. The defendant had the right, after the justice's decision against him, to have the proceedings stayed, by making compensation to the mother, &c. But as the proceedings were not stayed, and the justice's transcript does not show the compensation to have been made, &c., we must presume in favour of the proceeding of the justice, that the defendant did not compensate the mother, &c., conformably to the statute. If the compensation was made, the bond given, &c., before the taking of the recognizance, the defendant is not without remedy. He may plead the fact in bar, in the Circuit Court, of the accusation against him.

The defendant contends, in the second place, that [*271] the *complainant's affidavit, made before the justice, is defective for not stating that she resided in the county, that the child was born there, and that it was then alive. There was no necessity for the accusation to state these facts. The statute does not require it. The justice's transcript states that the complainant was resident in the county, and it must be presumed that the child was there born and was then alive. If the facts were otherwise, and were material, the defendant should have shown what they were.

Bates v. Wernwag, in Error.

The judgment of the Circuit Court, in discharging the defendant from the recognizance, is erroneous.

It appears that after the defendant was discharged, the State moved for a forfeiture of the recognizance. That motion was correctly overruled. It was too late, after the defendant's discharge, to have his recognizance forfeited. The motion, however, may now be renewed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. Herod and C. B. Smith, for the State.

D. Wallace and A. S. White, for the defendant.

MANN v. F. K. PERKINS, in Error.

REPLEVIN. Pleas: 1st. That the property of the goods was in *Solomon Perkins*; 2d. That the defendant was a constable, and as such had taken the property by virtue of an execution issued by a justice of the peace on a judgment against *Solomon Perkins*, and that the goods belonged to *Solomon Perkins*. Held, that the second plea might be rejected on the plaintiff's motion; it being the same in substance with the first.

Previously to the entry by a justice of a judgment by confession, the judgment-debtor must take an oath respecting the fairness of the judgment as is prescribed by the statute; and the oath must be filed and entered of record by the justice. *Vide Ex parte Knight, Ante*, p. 220, and note. See 5 Ind., 107; 1 Id., 54.

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*BATES v. WERNWAG, in Error.

A PLAINTIFF obtained a judgment before a justice on a note dated the 12th of *January*, 1833, bearing interest at a

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higher rate than six *per cent. per annum*. The defendant appealed to the Circuit Court. *Held*, that upon the plaintiff's recovery in the Circuit Court he was entitled to interest up to the time of such recovery at the rate mentioned in the note.(1)

(1) In 1833, and soon after the date of the note mentioned in the text, the law relative to interest was changed. See note to *Harvey v. Crawford*, Vol. 2 of these Rep., 43. See also Rev. Stat., 1838, p. 336.

DE CAMP and Another v. VANDAGRIFT.

BOOK ACCOUNT—EVIDENCE.—The plaintiff's books of account, in which he has charged the items for which he sues, are not admissible evidence to support his demand.

APPEAL from the *Fayette* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit commenced before a justice of the peace by *Vandagriff* against *C.* and *J. De Camp*. The justice gave a judgment for the plaintiff, and the defendants appealed to the Circuit Court. Verdict and judgment in the Circuit Court for the plaintiff.

The plaintiff's demand is for a great number of articles furnished the defendants at various times, in his business as a blacksmith. On the trial in the Circuit Court the plaintiff proved several of the items in his account, that he kept correct and fair books, and that he usually made his charges on a slate, from which they were afterwards copied into the day-book. He then offered in evidence his books of account to support his demand. This evidence was objected to, but the objection was overruled.

The admission of these books of account in evidence is assigned for error, and we think they ought not to have been admitted. To receive as evidence for a party the entries made by him in his books, would be permitting him to make
[*273] *evidence for himself. The common law of *England*, which we have adopted, does not countenance such

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proof. 12 Viner's Abr., 90, 91; Bull. N. P., 282; *Marriage v. Lawrence*, 3 Barn. & Ald., 142. The entries made by a person in his books may be evidence against him but not in his favour. The appellee cites some cases in the Courts of *New York* and *New Jersey* to show that the books of account were correctly admitted; but the decisions in those cases, we presume, are founded on the local law of those States. The common law recognized in this State excludes the evidence, and we have no statute on the subject.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

O. H. Smith, for the appellants.

C. B. Smith, for the appellee.

 LE CLAIR, Assignee, v. PETERSON.

WITNESS.—Debt on a promissory note for fifty dollars, brought by the assignee of the payee against the maker. The defendant offered in evidence, under the general issue, a deposition stating that the note was given to the payee in payment of a horse which belonged to the witness and the payee; that the payee afterwards agreed that the witness should receive from the defendant one half the amount of the note; and that the witness did receive from the defendant twenty-five dollars in part payment of the note. *Held*, that an objection to the deposition on the ground that the witness was interested, could not be sustained.

ERROR to the *Tippecanoe* Circuit Court.

. BLACKFORD, J.—This was an action of debt commenced before a justice of the peace, and founded on a note executed by the defendant to one *Patton*, the plaintiff's assignor, for fifty dollars payable in goods. Judgment by the justice for the defendant. The plaintiff appealed to the Circuit Court, and recovered a judgment for a small part of his demand. The plaintiff below is the plaintiff in error.

The only question necessary to be noticed in this case, relates to the admissibility of a deposition which was intro-

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duced in evidence by the defendant. This deposition [*274] states, that the * note was given to *Patton* in payment for a horse which belonged to the witness and *Patton*; that *Patton* afterwards agreed that the witness should receive from the defendant one-half the amount of the note; and that the witness did receive from the defendant twenty-five dollars in property in part payment of the note. The deposition was objected to on the ground that the witness was interested, but the objection was overruled.

This deposition was properly admitted. If the witness has no right to the amount received by him, he will be liable for it to the plaintiff or to *Patton*, should the plaintiff fail in this suit; and should the plaintiff succeed, the witness will be liable for the same amount to the defendant. The witness, therefore, stands indifferent between these parties. He has no interest in the event of the suit, nor can the verdict be given in evidence for or against him in any subsequent suit in which he may be a party. This decision is founded on the cases of *Ilderton v. Atkinson*, 7 T. Rep., 476, and *Larbalestier v. Clark*, 1 Barn. & Adol., 899. The case of *Buckland v. Tankard*, 5 T. Rep., 578, looks the other way, but that case is substantially overruled by the subsequent authorities.

It may be said, that the establishment of the validity of the payment would, by defeating the action, free the witness from a liability for the costs of that action, for which he would otherwise be liable to the defendant; but for which he could in no event be accountable to the plaintiff. The truth is, however, that the establishing of the payment would not defeat the plaintiff's suit for any thing known to the Court when the objection to the deposition was made. The note was before the Court. The amount of it was fifty dollars. There were payments endorsed on it, as received by *Patton*, amounting to nineteen dollars. The presumption therefore was, that though the payment of twenty-five dollars to the witness were allowed, there was still a balance due for which the plaintiff would have judgment together with costs. If, then, the law in these cases is, of which, however, we give no opinion, that a

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preponderating interest to defeat the action is given to a witness, when he is liable to the defendant for the costs which the plaintiff, by avoiding the payment to the witness, would necessarily recover of the defendant, that law does not apply to this case.

There is another reason why that law, if it be as above supposed, does not apply here. There was no proof [*275] before the *Court, that the witness had obtained the payment by fraud. His deposition only says, that he was entitled to one-half the amount of the note, and that he received it of the defendant; but it does not state, nor does the record show, what representations, if any, were made by the witness when he received the payment. The Court could not presume, in the absence of proof, that the witness had obtained the payment by fraud; and if it were not so obtained, he could not be liable to the defendant for the costs in question. *Larbalistier v. Clark*, above cited.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs. To be certified, &c.

A. S. White and *R. A. Lockwood*. for the plaintiff.

J. Pettit for the defendant.

CREWS v. SHEETS.

JUSTICE OF THE PEACE—NEGLECT TO TRANSMIT PAPERS IN APPEAL CASE.—

A justice of the peace rendered a judgment for *A* the plaintiff, and the defendant *B* appealed. The justice failed to transmit the papers in time to the clerk's office, and the appeal was dismissed. *B* sued the justice for this neglect. *Held*, that the declaration, in such case, should state that *B* had a good defense to the whole or a part of *A*'s demand.(a)

APPEAL from the *Boone* Circuit Court.

BLACKFORD, J.—Trespass on the case against *Sheets*, a justice of the peace, for a neglect of duty. The declaration

(a) *Peters v. Land*, 5 Blackf., 12.

states that *John Dye* recovered a judgment before the defendant, a justice of the peace, against the plaintiff for the sum of fifty dollars; that the plaintiff, within thirty days from the judgment, filed a good appeal-bond which was accepted by the justice; and that it thereby became the duty of the justice to transmit the papers in the cause to the clerk's office, within twenty days after the appeal-bond was filed. The declaration states further, that the justice did not, within the twenty days, transmit the papers to the clerk's office; and that the appeal was consequently dismissed at the plaintiff's costs. Damage \$200. The declaration was demurred to, and a judgment rendered for the defendant.

[*276] *This declaration is objectionable for not stating, that *Crews* had a good defense to the whole or a part of the original demand. It appears to us that, without such a defense, the plaintiff can have no reason to complain that he lost the appeal by the neglect of the justice. He could have derived no benefit from the appeal, unless he had some defense to make to the suit.

Actions against sheriffs for escapes are similar in principle to the case before us. When the suit against a sheriff is for an escape on *mesne* process, the declaration must aver a good cause of action against the original defendant; and when the action is for an escape on execution, the judgment on which the execution issued must be averred. 2 Stark. Ev., 740, 742. The law must be the same in the case we are considering. If the plaintiff in the justice's Court had been refused an appeal, and he had sued the justice for the refusal, the declaration must have shown a cause of action in the original suit. So, when the defendant before the justice sues him for the refusal of an appeal, his declaration should allege that he had a good defense to the whole or a part of the demand for which the judgment was rendered. There must be a breach of duty in these cases of which the plaintiff has a right to complain, and from which the law will presume that he has sustained a damage.

This case is not like an action by a client against his attor-

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ney for neglecting to plead to a suit. The client is not, in such a case, obliged to show that he had a good defense to the original demand. *Godefroy v. Jay*, 7 Bing., 413. In that case, there is a contract between the attorney and client founded upon a valid consideration, and the negligence is a breach of that contract. But the *gravamen* in the present case is not a breach of contract but a tort. It is the justice's neglect of his duty, and the plaintiff's consequent loss of his defense to the original action, which are the foundation of the suit. The declaration before us, therefore, should not only have stated the negligence of the justice, but it should also have shown that the plaintiff had a good defense to the whole or a part of the action, which defense had been lost by the negligence complained of. The existence of such a defense is not averred in this declaration, and the plaintiff has therefore shown no cause of action.

[*277] **Per Curiam*.—The judgment is affirmed with costs. To be certified, &c.

J. Morrison and *W. Quarles*, for the appellant.

H. Brown and *C. C. Nave*, for the appellee

YOUNG v. TUSTIN, an Infant.

TRESPASS—COUNSEL FEES.—The jury, in trespass to personal property, can not increase the amount of their verdict for the plaintiff by an allowance of counsel fees.

SAME—DAMAGES.—The plaintiff in such suit can not recover damages which are not implied by law from the wrong committed, unless they are specially stated in the declaration.

APPEAL from the *Shelby Circuit Court*.

BLACKFORD, J.—*J. Tustin*, an infant, by *A. Tustin*, his next friend, sued *Young* in an action of trespass. The ground of action is the killing of the plaintiff's horse by fastening a heavy piece of wood to his neck. Damage, \$150. Two pleas: 1st, the general issue; 2d, that the horse was trespassing on the

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defendant's enclosure, wherefore he put a yoke on him, &c. The second plea was demurred to, and the demurrer correctly sustained. The cause was tried on the general issue, and the plaintiff obtained a verdict and judgment for forty-five dollars.

The Court refused to instruct the jury that the plaintiff could not recover counsel fees, but instructed them that they might give the plaintiff, by way of damages, his reasonable expenses in the prosecution of the suit. The Court committed an error in refusing the instructions asked for, and in giving those which were given. The jury can not increase the amount of their verdict for the plaintiff by the allowance of counsel fees. The only fee of that character which a successful plaintiff can be entitled to, is that which the statute denominates an attorney's fee, and that is only recovered by its being included in the judgment for costs.

There is another objection which not only applies to the instructions refused, but also to those which were given. This is not a cause in which any damages, not naturally and [*278] *necessarily arising from the killing of the horse, could be recovered; because the declaration contains no averment that any such damages had been sustained. This objection to the recovery of the counsel fees and expenses in question, were there no other objection to their recovery, would be fatal. In actions of trespass, the plaintiff can not recover damages which are not implied by law from the wrong committed, unless they are specially stated in the declaration. 1 Chitt. Pl., 441.

In the case under consideration the instructions refused should have been given, and those given should have been refused.

Per Curiam.—The judgment is reversed and the verdict set aside at the costs of the *prochein amy*. Cause remanded, &c.

J. Ryman, for the appellant.

P. Sweetser and *S. Major*, for the appellee.

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*CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1837, IN THE TWENTY-FIRST
YEAR OF THE STATE.

MEMORANDA.

JOHN T. M'KINNEY, Esquire, one of the Judges of this Court, died in the last vacation at his residence in *Brookville*. He was succeeded by *Jeremiah Sullivan*, Esquire, who took his seat on the third day of the present term.

WELBORN and Others *v.* JOLLY.

DEATH OF JUDGMENT-DEBTOR—FORM OF EXECUTION—A transcript of the judgment of a justice of the peace, with a certificate that an execution on the judgment had been returned “no property found,” was filed in the clerk’s office of the Circuit Court for the purpose of obtaining an execution from that Court. After the transcript was filed, and before the execution

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issued, the judgment-debtor died. *Held*, that in such case, the *scire facias* to have execution from the Circuit Court, should be not only against the heirs of the deceased, but also against his executors or administrators, and the terre-tenants, if any.(a)

ERROR to the Posey Circuit Court.

DEWEY, J.—This is a proceeding for the purpose of obtaining execution from the Circuit Court on a judgment of a justice of the peace. It is instituted under the 48th section [*280] of *the “act regulating the jurisdiction and duties of justices of the peace.” Rev. C., 1831, p. 309.

A transcript of a judgment in favour of the appellee against *Jesse Y. Welborn*, rendered by a justice, was filed in the clerk’s office, together with a certificate that execution upon the same had been issued to the proper officer, and by him returned “no property found.” A *scire facias* issued from the Circuit Court against *Jesse Y. Welborn*, and was served upon him; but before any further steps were taken, his death was suggested upon the record, and the suit abated. On motion of the appellee, an order for a *scire facias* was obtained against the heirs of the deceased, (naming them), who are the appellants. The writ accordingly issued against them by name, describing them as heirs. Neither executor, administrator, nor terre-tenant, is mentioned in it. The appellants appeared to the *scire facias*. A part of them moved the Court to quash the writ. One pleaded *riens per descent*, to which there was a general demurrer. Another being under the age of twenty-one years, by his guardian *ad litem*, prayed that the *parol might demur* until his full age. The Court overruled the motion to quash, sustained the demurrer to the plea, rejected the prayer of the infant, and rendered final judgment of execution against all the appellants.

The view we shall take of this cause precludes the necessity of deciding whether or not the common law practice of staying proceedings against an infant until his full age has been adopted into our system of jurisprudence.

(a) *Vance v. Cowing*, 13 Ind., 460; *St. John v. Hardwick*, 11 Ind., 252; *Graves v. Skeels*, 6 Ind., 107; *Williams v. Morehouse*, 6 Blackf., 215.

The question arising under the motion to quash the writ, and that presented by the demurrer, are the same; for, allowing the plea of *riens per descent* to be well pleaded, (as to which we give no opinion), the demurrer, as well as the motion, involves the sufficiency of the *scire facias*, which performs the office of a declaration. The objection to it is that it does not include the executor or administrator of *Jesse Y. Welborn*, nor show any cause for the omission.

By the common law, a *scire facias* must issue against the personal representative of a person dying after judgment, before his lands can be reached in the hands of his heirs, or the terre-tenants. 2 Tidd's Prac., 1059; 6 Bac. Abr., 114, tit. *Sci. Fa.* The reason is, that assets are first chargeable with the payment of debts.

[*281] *Although a literal construction of the clause of the statute under which this proceeding has been instituted, seems to give a creditor by judgment of a justice, the choice of proceeding, either against the "executors, administrators or heirs," and terre-tenants, if any, we can not suppose that the Legislature designed to render the land liable on such a judgment immediately after the decease of a debtor. Such an interpretation would be incompatible with that provision of the probate law which provides that no executor or administrator shall be sued in less than one year after obtaining letters testamentary or of administration. Indeed, it would be equally hostile to various other provisions of that law. Nor can we believe that it was the design of the Legislature to make a distinction between the judgments of the Circuit Courts and those of justices advantageous to the latter. Yet such would be the result should we construe the clause of the statute in question to mean that the real estate of a deceased person might be reached by proceedings prescribed by it, immediately after his death. There is no mode pointed out by our statutes by which a judgment of the Circuit Court against a decedent can be enforced against real estate, until after the assets in the hands of the executor or administrator have been found to be insufficient for the payment of debts. And even after judg-

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ment is obtained against the executor or administrator, and an execution returned unsatisfied, further proceedings against them, conjointly with the heirs and devisees, are requisite before land can be reached. Rev. Code, 1831, pp. 243, 244.

The execution contemplated by the act which we are considering runs against "the goods and chattels, lands and tenements" of the deceased. Why should it run against "goods and chattels," unless the executor or administrator, who has the management of them, is to be made a party to the proceedings of which it is the result?

On the whole, we think the *spirit* of this act, as well as the general policy of our legislation, which considers the personality of either living or deceased persons as the first fund for the satisfaction of debts, requires the executor or administrator and the heir, and terre-tenant, if any, to be made parties to the *scire facias*. That not having been done in this case, the

Circuit Court erred in not quashing the writ.

[*282] * *Per Curiam*.—The judgment is reversed, and the proceedings subsequent to the abatement of the suit by the death of *Jesse Y. Welborn* set aside, with costs. Cause remanded for further proceedings, &c.

W. T. T. Jones and *J. R. E. Goodlet*, for the appellants.

J. Pitcher, for the appellee.

RUDISILL v. SILL.

FALSE RECITAL IN PLEADINGS—PRACTICE.—If in a suit on a specialty, the defendant obtain *oyer* of the instrument, and then set it out untruly in a material part and demur to the declaration, the Court, on the plaintiff's motion, will set aside the demurrer, and render judgment in his favour for want of a plea, unless the defendant obtain leave to proceed more correctly.

APPEAL from the *Boone* Circuit Court.

DEWEY, J.—This was an action of debt. The declaration describes, as the cause of action, a single bill for the payment of a sum of money "on or before the 20th day of *February*."

The defendant below having obtained *oyer* of the deed [*283] declared *on, set out an instrument payable "on or before the 12th day of *February*, and demurred generally. The plaintiff below having produced to the Court the writing obligatory on which the action was founded, which corresponded with the description of it in the declaration, moved the Court to reject the demurrer because of the misrecital. The demurrer was rejected, and the defendant making no further defense, judgment was rendered against him by *nil dicit*. The error assigned is the rejection of the demurrer.

A party who has obtained *oyer* of a specialty may waive the benefit of it if he please, but if he professedly set it out upon the record, he is bound to recite it truly and entire; and if he misrecite it, his adversary has a remedy against the consequences of the misrecital by the usual *English* practice, in either of two ways: He may *sign judgment* as for want of a plea, or he may make the misrecited deed a matter of record by enrollment and demur. This latter mode of proceeding, however, is applicable only to a plea averring matter of fact, and can not be pursued in regard to a demurrer containing false recitals. And it has also been held, that instead of adopting either of these modes of remedy, the pleader of the deed may move the Court to quash the false plea. 4 T. Rep., 370. Our practice does not admit of a party *signing judgment*; he is nevertheless not bound to answer pleading containing untrue recitals upon *oyer*; he may move the Court to reject such pleading, and upon his motion being granted take judgment for want of pleading, unless his adversary obtain the leave of the Court to proceed more correctly.

It has been contended that a *plea* containing a misrecital is distinguishable from a *demurrer* of a similar character, and that although such a plea may be set aside upon motion, it would be improper to treat a demurrer in the same manner, because the latter may reach other defects of the declaration than the apparent variance produced by the false recital, and that therefore there should be a joinder in demurrer, after enrolling the true deed. The distinction is not well taken. The reason of

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signing judgment, or of rejecting the plea on motion, is, that the false recital contained in it is a *breach of the condition*, upon which the pleader undertakes to avail himself of the benefit of *oyer*, that he shall recite truly every material part of the deed, of which profert has been made by the
 [*284] other party. *Gould's Plead., 450. This condition is equally broken, whether the privilege gained by *oyer* be abused by false recital in a *demurrer* or *plea*. In either case, the party persevering in such an error subjects himself to a judgment by *nil dicit*.

Per Curiam.—The judgment is affirmed with five *per cent.* damages and costs.

A. S. White and R. A. Lockwood, for the appellant.

I. Naylor, for the appellee.

[*285] *STINSON v. BUTLER and Others.

OHIO RIVER AS A BOUNDARY.—Where land is bounded by the *Ohio* river on the *Indiana* side, the owner's right extends to low-water mark.^(a)

ERROR to the *Vanderburgh* Circuit Court.

BLACKFORD, J.—This was an action of trespass *quare clausum fregit*, brought by *Stinson* against *Butler* and others. Plea, not guilty. Verdict and judgment for the defendants.

On the trial, the plaintiff asked the Court to instruct the jury—That where lands are bounded by the *Ohio* river on the *Indiana* side, the owner's right extends to low-water mark. This instruction was refused. The record shows that the instruction was applicable to the evidence in the cause.

We think that the instruction ought to have been given. The proprietors of land situated in this State, and bounded on one side by the *Ohio* river, must be considered as owning the soil to the ordinary low-water mark. The *English* authorities

(a) *Cowden v. Kerr*, 6 Blackf., 280; *Bainbridge v. Sherlock*, 29 Ind., 364; *Gentile v. The State*, Id., 409.

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relied on by the defendants, to show that high-water mark is the boundary, are all cases respecting waters which ebb and flow with the tide, and which are therefore considered as a part of the sea. These cases have no application to the question before us.

The State of *Virginia*, being the proprietor of the lands on both sides of the river, ceded to the *United States* her right to the territory "situate, lying, and being, to the north-west of the river *Ohio*." It is decided that, under this grant, the ordinary low-water mark of the river, is the boundary of the territory granted. *Handly's Lessee v. Anthony*, 5 Wheat., 374. And we are of opinion that when the *United States*, or any of her grantees, convey any of this land situate on the river, in *Indiana*, without a special contract to the contrary, the same mark must be considered as the boundary of the grant.

Per Curiam.—The judgment is reversed and the verdict set aside with costs. Cause remanded, &c.

S. Judah, for the plaintiff.

J. A. Brackenridge, for the defendants.

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*RASOR v. QUALLS.

TRESPASS—LICENSE.—Trespass for breaking the plaintiff's close and taking away his grain. Special plea, that the close was the freehold of *A*, and that by his license the defendant entered, &c. *Held*, that the plea was good. *Held*, also, that the facts contained in the plea might be given in evidence under the general issue.(a)

GROWING CROPS.—A person having a pre-emption right to a certain tract of *United States'* land, which right was to expire on a certain day, sowed grain on the land which he knew would, on that day, be unripe, and then permitted the time to expire without making the purchase. *Held*, that a stranger, who afterwards purchased the land of the *United States*, was entitled to the growing crop.(b)

(a) *Grounour v. Daniels*, 7 Blackf., 108.

(b) *Stewart v. Haynes*, 5 Blackf., 163.

APPEAL from the *Franklin* Circuit court.

BLACKFORD, J.—Trespass *quare clausum fregit*, brought by *George Rasor* against *Nicholas Qualls*. There are two counts in the declaration. The first is for breaking the plaintiff's close in *August*, 1836, and taking and carrying away a certain quantity of his grain. The second count is for forcibly taking and carrying away a certain quantity of other grain belonging to the plaintiff. The defendant pleaded the general issue. He also pleaded in bar to the first count, the following special plea, viz: that the close in that count mentioned now is, and at the time when, &c., was, the soil and freehold of one *John M. Qualls*; and that the defendant, on, &c., by the license of the said *John M. Qualls*, broke and entered the close, and took and carried away the grain; which is the same trespass, &c. The special plea was demurred to, but the demurrer was overruled. No formal judgment was rendered on the demurrer, and the parties went to trial on the general issue to the whole declaration.

After the evidence was closed, the Court instructed the jury as follows: that if it was proved that the plaintiff had a pre-emption right to the premises, which expired in *June*, 1836; that the crop which was sued for was put in during the existence of that right, and was unripe and growing when the right expired; and that the defendant, after the expiration of this pre-emption right, bought the land of the *United States* and took the growing crop; the crop belonged to the defendant, and the jury ought to find in his favour.

A verdict was found for the defendant, and there was a judgment accordingly.

[*287] *The first question submitted by the parties is, was the special plea to the first count valid?

That question we decide in the affirmative. The ground of action contained in the first count, is the breaking and entering the plaintiff's close. The taking away the grain mentioned in that count, belongs to the description of the trespass, and is only laid by way of aggravation. It was not necessary that the plea should notice this matter of aggravation, as appears

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by the following cases: In trespass for breaking and entering the plaintiff's house, debauching his daughter and getting her with child, *per quod servitium amisit*, if the defendant can justify the entering of the house, he defeats the action. *Bennett v. Allcott*, 2 T. R., 166. So, in trespass for breaking and entering the plaintiff's house, and expelling him therefrom, a justification of the breaking and entering the house is a bar to the suit. *Taylor v. Cole*, 3 T. R., 292. It is therefore settled, that all the defendant had to show, in answer to the first count, was, that he had a right to enter on the premises; and we are next to enquire, whether that right is shown by the plea. It is decided, that a person having the freehold and a right to the possession, may enter on the close even by force, without subjecting himself to an action of trespass by the party in possession. *Taunton v. Costar*, 7 T. R., 427; *Butcher v. Butcher*, 7 Barn. & Cress., 399. And any person, by virtue of an authority from such owner, may do the same. There is, indeed, a decision in point to show, that proof that the freehold was in a third person, and that the defendant entered under his authority, is a good defense to a charge of breaking the close. *Diersly and Nevel's case*, 1 Leonard's Rep., 301. This case in *Leonard* is cited in Gilbert's Evidence, p. 255, and is approved by Justice Lawrence in *Argent v. Durrant*, 8 T. R., 405. These authorities prove, that the facts contained in this special plea, are an answer to the charge in the first count of breaking the plaintiff's close; and they must consequently be considered a sufficient answer to that count. The defendant had his choice to plead these facts specially, or to give them in evidence under the general issue. 1 Chitt. Plead., 538, 541.

The second question in the cause is, were the instructions to the jury correct?

This question must also be decided in the affirmative. The act of Congress of 1834, which revives a previous [*288] law granting *pre-emption rights to settlers on the public lands, is the act under which the plaintiff's right of pre-emption was claimed. That act expired, by its own limitation, on the 19th of June, 1836. Acts of Congress,

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1834, p. 28. The plaintiff therefore knew when he planted in 1836, whether the crop could ripen or not before his pre-emption right must expire; and his claim to the crop in question, may be tested by the rule that regulates the claim, which a lessee for a certain term of years has to the emblements that are growing when his lease expires. The law has always been, that if such a lessee for years, in the last year of his term, sow a crop, and it be not ripe and cut before the expiration of the term, the landlord is entitled to the crop. It was the tenant's own folly say the books, to sow when he knew with certainty that his lease would be at an end before the time of harvest. 2 Blacks. Comm., 145; 4 Kent's Comm., 109. So, it may be said here with the same propriety, that it was the plaintiff's folly to plant the crop in question, when he knew that his pre-emption right must expire before the crop could be ripe. According to the facts assumed in the instructions to the jury, the opinion of the Circuit Court is correct, that the crop mentioned in the declaration belonged to the purchaser of the land.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

J. Ryman, for the appellant.

G. Holland, for the appellee.

 LYNCH v. WILSON.

VARIANCE—PLEADING.—Covenant on a lease of a tavern with certain articles for house-keeping. Among the articles specified in the declaration, are three termed *two was-pans* and *one pair of waffle*. The lease produced on *oyer* mentions the same articles with those set out in the declaration, but describes the three above-named as *two wash-pans* and *one pair of waffle-irons*. The lease produced showed also that several words in it (which were in the declaration), had been crossed with a pen, but in such a manner as to leave them legible. The declaration did not profess to set out the lease *in hæc verba*. *Held*, that a demurrer for the variance could not be sustained. (a)

(a) See *Alvord v. Moffatt*, 10 Ind., 366; *Burton v. The State*, 6 Blackf., 339.

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[*289] *SAME.—When the pleader professes to give the tenor of a writing, or when *oyer* of a deed is given and *non est factum* pleaded, or when a record is described and *nul tiel record* pleaded, verbal variances, except in cases of misspelling where the *idem sonans* is preserved and the sense of the word not changed, are fatal.

APPEAL from the *Putnam* Circuit Court.

DEWEY, J.—This was an action of covenant. The declaration sets forth a lease of a tavern stand, together with a great variety of articles of household stuff. Among those specified are three, which are termed “*two was-pans*” and “*one pair of waffle*.” On *oyer*, the defendant in the Court below spread upon the record a demise, enumerating the same articles as those alleged in that in the declaration, but describing the three above-named as “*two wash-pans*” and “*one pair of waffle-irons*.” It appears, also, from the record, that many of the words in the lease, as set out on *oyer*, are crossed by the mark of a pen, but in such a manner as to leave them legible and sensible.

The defendant demurred, demurrer overruled and judgment for plaintiff.

It is contended that there is a variance between the lease described in the declaration and that set out on *oyer*, in two particulars; one as to the wash-pans and waffle-irons, and another produced by the crosses traced over a part of the words in the demise exhibited on *oyer*.

There are two classes of cases in which, in setting out written instruments in pleading, literal accuracy is necessary; where the pleader professes to give the *tenor* of the writing, and where, on *oyer*, a deed is recited and *non est factum* pleaded. In the first instance, the instrument produced by him who pleads it, must correspond literally with that set out in the pleading; and in the second, the deed proved to have been executed must agree precisely with that contained in the *oyer*. In these classes may also be ranked the description of a record, when *nul tiel record* is pleaded. In all these instances, mere verbal variances, except those produced by misspelling, where the *idem sonans* is preserved and the sense of the word

not changed, are fatal. Salk., 660; *Boyce v. Whitaker*, Doug., 94; Cowp., 229; 5 Taunt., 707.

There is another class of cases in which the pleader does not profess to set out the *tenor* of a written instrument, [*290] but *its *legal effect* or *substance*. Here the pleading may be good, though it contain not a single word found in the document adduced in evidence to support it or given on *oyer*, with the exception of the names of the parties, and the statement of sums, times and places. In this class, material variances, changing the sense of the written instrument, only are available. *Rex v. May*, Doug., 184; *Morgan v. Edwards*, 6 Taunt., 394; *Byne v. Moore*, 5 Taunt., 187; 1 B. & B., 443; 1 B. & C., 358; 1 Chitt. Pl., 5 Am. ed., 334.

Much of the misconception which has prevailed on the subject of variance, and often given rise to contradictory decisions, has been caused by confounding the principles applicable to these several classes of cases.

In the case before us, the declaration does not profess to set out the deed in *hæc verba*, but the substance of it, and can be reached only by a material variance. The lease recited in the demurrer, and that described in the declaration, are substantially the same. The terms *was-pans* and *one pair of waffle*, connected as they are in the declaration with things of the like kind, can not be understood to mean anything different from wash-pans and waffle-irons. The case of *Morgan v. Edwards* is in point. The declaration described a lease of a colliery "with privilege to dig, sink, drive, run and make pits, shafts, levels and *sloughs*." The instrument offered in evidence in support of that allegation had *soughs* instead of *sloughs*. Although these words have distinct and very different meanings, the Court held the variance not material, because it was evident the privilege of making "sloughs," or quagmires in working a mine, could not have been intended by the parties, but that the right to make "soughs," or drains, which are useful in such works, was clearly their intention.

There does not appear to be any variance in consequence of the crosses traced over some of the words of the lease as given

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on *oyer*. The crosses do not render the crossed words illegible; and if these words be considered as a part of the instrument, it agrees with that set out in the declaration. The Court, in considering the demurrer, could not say they were not a part of it. Why the crosses were made, by whom, under what circumstances, whether they cancelled the deed, or the words crossed were meant to be expunged or not, might have been questions of fact proper for the inquiry of a jury [*291] *upon *non est factum*. The Circuit Court committed no error in overruling the demurrer to the declaration.

Per Curiam—The judgment is affirmed, with costs. To be certified, &c.

J. Whitcomb, for the appellant.

C. P. Hester, for the appellee.

THE STATE, on the relation of EVANS, v. HOUSTON and Others.

OFFICIAL BOND OF JUSTICE—LIABILITY OF SURETIES.—In the case of a breach, by a justice of the peace, of the condition of his official bond, his death does not discharge the responsibility of his sureties.

SAME.—If the justice were, in such case, the sole obligor, or the surviving obligor, the action would survive against his executors or administrators.

ERROR to the *Monroe* Circuit Court.

DEWEY, J.—Debt against the defendants in error as sureties of a justice of the peace on his official bond.

One *Adams* obtained a judgment before *Hartsock*, a justice of the peace, against *Evans*, the relator. *Evans* took an appeal regularly to the Circuit Court. The justice failed to file the papers in the appeal with the clerk of the Circuit Court within twenty days after the time of taking the appeal, but filed them after the lapse of that period. The Circuit Court, for that cause, dismissed the appeal at the cost of *Evans*. *Evans* sued *Hartsock* and his sureties in the name of the State. The

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breach of the condition of the bond assigned is, the failure of the justice to file the appeal with the clerk of the Circuit Court in due season. After the service of process upon *Hartsock* he died. His sureties, the present defendants in error, pleaded his death in abatement of the suit. The plaintiff demurred. The Circuit Court held the plea sufficient, and rendered final judgment for the defendants.

The ground on which the defendants rest their vindication of this judgment is, that though the *form* of the action be debt, its *cause* is *ex delicto*; that it does not survive against the executor or administrator of the justice, and that therefore his sureties were discharged from their responsibility by his death.

[*292] *For the correctness of this position, they rely upon those decisions which have established the law to be, that the executor or administrator of a sheriff, having suffered an escape on execution, and of a person, having incurred the forfeiture of a penal statute, are not responsible for the *torts* of those whom they represent. Those decisions are founded upon statutory provisions which give the action of debt against the wrong-doers, but do not extend the liability to their representatives. The *form* of the action is arbitrary, but its *cause* is exclusively *tort*. Contract, express or implied, forms no feature of it. The maxim, *actio personalis moritur cum persona*, has therefore been held to apply to cases of this description. 3 Dyer, 322; 1 Chitt. Pl., 103; 2 Will. on Ex., 1063.

But this maxim, which, it has been remarked, is far from being generally true, we believe, has never been applied to actions *ex contractu*, with the exception of contracts which, in their character, are *personal*, and the breach of which is unattended with special damages or pecuniary injury, such as marriage contracts, and covenants to instruct apprentices, &c. 2 M. & S., 408; 1 Chitt. Pl., 58; 2 Will. on Ex., 1058, 1061; 1 Saund., 216 *a, n.* 1; 3 Bac. Abr. tit. Ex. and Adm. P., 1, 2; Cro. Jac., 662. It is well settled that it does not apply to those cases in which the injured party has his election between

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case and *assumpsit*, provided he elect the latter remedy. Within this class of cases are included injuries arising from the negligence or misconduct of common carriers, attorneys, mechanics, &c. In *assumpsit* for these injuries, the gist of the action is the breach of the contract, either express or implied, and though its breach consists in the commission of a *tort*, it does not change the nature of the remedy, nor prevent it from surviving against the executor or administrator of the wrongdoer. 2 Will. on Ex., 1065; 2 New Rep., 370; Cowper, 371. In the case last quoted, Lord *Mansfield*, after remarking that "the Court had looked carefully into all the cases on the subject," said that "where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labor, or property of another, or a promise by the testator, express or implied; where these are the causes of action, the action survives against the executor."

This action is founded upon a writing obligatory, conditioned for the faithful performance by one of the obligors, [*293] **Hartsock*, of the duties of a justice of the peace.

These duties are defined and prescribed by statute. Among them was that of filing all appeals taken from his judgments with the clerk of the Circuit Court within a given time. This he failed to do, and special damages are laid and claimed against him and his sureties for the violation of their contract. That his failure to file the appeal in season was a breach of the condition of the bond, there can be no doubt; and it is not the less so because it involved on the part of *Hartsock* a *tort*, for which he was, in his lifetime, liable in another form of action. Had he been sole obligor to the bond, or the survivor of the other obligors, we can not doubt, in view of the principles which we have laid down, that the action would have survived against his executor or administrator. But admitting that it would not, it by no means follows that his death exonerates his sureties from the liability which they incurred in his lifetime by a forfeiture of the bond. They are not, and can not be liable in any action founded on *tort*. Their responsibility is exclusively *ex contractu*. They are sued on a

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breach of their own covenant, and it is not easy to perceive how the doctrine *moritur cum persona* can be applied to them.

We think the Circuit Court erred in sustaining the plea in abatement.

Per Curiam.—The judgment is reversed and the proceedings subsequent to the joinder in demurrer set aside, with costs. Cause remanded, &c.

C. P. Hester, for the plaintiff.

J. L. Ketcham, for the defendants.

HOUSE v. FORT.

BREACH OF WARRANTY.—The breach of an express warranty as to the soundness of a horse is, of itself, a valid ground of action, whether the suit be founded on tort or on contract.(a)

SAME.—If the suit in such case be in tort the form of the declaration is, that the defendant falsely and fraudulently warranted, &c.; but the words *falsely* and *fraudulently*, thus used, are only matters of form.

SAME.—In the case of an express warranty a *scienter* need not be laid, nor if laid, need it be proved.

[*294] ***OPINION OF WITNESS.**—A witness called to give an opinion relative to the defects of a horse's eyes, stated that he was not a farrier, but that he professed to understand when he tried a horse whether his eyes were good or not, though there might be diseases of the eyes of horses with which he was unacquainted. *Held*, that the witness might be examined.

WARRANTY—INTENTION OF PARTIES.—In a suit on the warranty of the soundness of a horse, proof of the warranty and of the breach establishes the plaintiff's case; but an oral affirmation of the soundness of the horse, which was exposed at the time to the buyer's inspection, is not a warranty unless it was so intended by both parties, and that intention must be shown to the satisfaction of the jury.(b)

PRINCIPAL AND AGENT.—Contracts with an agent acting in his principal's name inure to the benefit of the principal.

WHAT AMOUNTS TO A WARRANTY.—If a horse is warranted sound and wants the sight of an eye, an action lies; but a statement by the seller, that the horse's eyes are as good as any horse's eyes in the world, does not of itself amount to a warranty.

(a) *Galling v. Newall*, 9 Ind., 572.

(b) *Jones v. Baum*, 5 Ind., 154; *Jones v. Quick*, 28 Ind., 125.

APPEAL from the *Henry* Circuit Court.

BLACKFORD, J.—This was an action of trespass on the case upon promises, brought by *Fort* against *House* before a justice of the peace. The action is founded on a breach of warranty in the exchange of horses. The defendant pleaded the general issue. Verdict and judgment before the justice for the defendant. The plaintiff appealed to the Circuit Court, and obtained there a verdict and judgment. The defendant appeals to this Court.

An objection is made to these proceedings because the Circuit Court overruled the defendant's motion to dismiss the suit. The ground of the motion was, that the statement of demand certified up by the justice contained no cause of action. The following is the substance of the statement objected to:

James Fort v. Isaac House. Trespass on the case. The plaintiff complains that on, &c., at, &c., the defendant, in a certain exchange of horses with the plaintiff, falsely and fraudulently represented his horse as sound and clear of blemish, and worth seventy-five dollars, when, in fact, he was worth only twenty-five dollars, and the horse which the defendant received in exchange was worth seventy-five dollars; that, on the exchange, the defendant warranted that his horse was sound and had good eyes, when in fact he was blind. Damage, fifty dollars.

This statement of demand is objected to on the ground that it does not allege a *scienter*, nor a false and fraudulent warranty. An answer might be given to this objection by merely observing that, according to the justice's transcript, this is an action on the case upon promises, and can not therefore [*295] require any evidence of fraud to support it. But were it an action on the case in tort, still, as an express warranty is set out, the omission of an averment of fraud, is not a substantial defect in the statement. The breach of an express warranty is of itself a valid ground of action, whether the suit be founded on tort or on contract. *Williamson v. Allison*, 2 East, 446. It is true that in the action on tort, the forms of the declaration are, that the defendant

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falsely and fraudulently warranted, &c., but the words falsely and fraudulently, in such cases, are considered as only matters of form. *Osgood v. Lewis*, 2 Harr. & Gill., 495. As to the *scienter*, mentioned in the defendant's argument, that is not necessary to be laid where there is a warranty, though the action be in tort; or if the *scienter* be laid in such a case, there is no necessity of proving it. *Williamson v. Allison*, 2 East, 446. The statement in question is entirely without form, but it is sufficient in substance; and the objection made to it was correctly overruled.

It is also objected to these proceedings, that illegal testimony was admitted. It appears that one of the plaintiff's witnesses testified, that about a month after the exchange, he examined the horse whose soundness is in controversy; that he was not a farrier, but that he professed to understand when he tried a horse whether his eyes were good or not, though there might be diseases of the eyes of horses with which he was unacquainted. The witness was then asked by the plaintiff, whether, from his knowledge of the diseases of horses' eyes, he believed the disease of the eyes of the horse in question had been of long standing, and had existed before the exchange of horses made by the parties. This question was objected to, but the witness was permitted to answer it; and his answer was in the affirmative. We think that the objection to this evidence was properly overruled. We have scarcely any veterinary surgeons in our country, and the opinions of men of such knowledge as this witness appears to have, must be admitted in cases like the present. The jury can always give such weight to the testimony as they may think it merits.

There were several instructions given to the jury of which the defendant complains.

The first is: That if it was proved, under the issue, that the horse was warranted sound, when he was not so, the jury should find for the plaintiff. This instruction [*296] is *unexceptionable. Proof of the warranty and of the breach established the plaintiff's case.

The following is the second instruction: That any positive

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affirmation of soundness, made at the time of the contract and before the exchange amounts to a warranty. This instruction is not correct. An oral affirmation of the soundness of a horse, which was exposed to the purchaser's inspection, can not be considered as a warranty, unless where it is so intended at the time by the parties; and that intention must be shown to the satisfaction of the jury. The mere affirmation of soundness, in a case like this, is not, *per se*, a warranty. It is of itself only a representation. To give it the effect of a warranty, there must be evidence to show that the parties intended it to have that effect. The following cases are in point: *Swett v. Colgate*, 20 Johns., 196; *Duffee v. Mason*, 8 Cowen, 25; *Osgood v. Lewis*, 2 Harr. & Gill, 495.

The third instruction is; That if the plaintiff's son, by order of his father, exchanged the horses, the representations of the defendant to the son, must have the same effect as if they had been made to the plaintiff. We can see no objection to this instruction. It is a familiar principle, that contracts with an agent, acting in his principal's name, inure to the benefit of the principal; and the instruction, it may be presumed, had reference to such a case.

The fourth instruction is: That any affirmation by the defendant of the soundness of the horse, which the plaintiff understood to amount to a warranty, was a sufficient warranty to authorize a recovery, if the horse, at the time of the exchange, was not sound. This is wrong. To give to a mere affirmation of soundness, in this case, the effect of a warranty, required, as we have already stated, that both parties should have understood it to be a warranty.

The last instruction objected to by the defendant is as follows: That if a horse is warranted sound, and wants the sight of an eye, though it seems to be the object of one's senses, yet as the discernment of such defects is frequently a matter of skill, an action lies to recover damages. There can be no objection to this instruction. Indeed, the Circuit Court has here adopted the precise language of *Blackstone*. 3 Bl. Comm., 165.

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There was one instruction asked for by the defendant, viz.: *That if the defendant, at the time of the exchange, on being questioned as to the horse's eyes, said they were as good as any horse's eyes in the world, that did not amount to a warranty. This instruction was refused. The record shows, that the defendant spoke the words mentioned in this instruction, and the question presented is, do those words of themselves, in this case, amount to a warranty? Our opinion is that they do not, and that the instruction should have been given. The observations which we have already made, relative to the second instruction asked for by the plaintiff, are applicable to this part of the case. There was no warranty *in terms*; and if by the language used a warranty was intended, that intention was to be proved. The language, as it is presented in the instruction, is not of itself a warranty, either expressed or implied.

Per Curiam.—The judgment is reversed, and the verdict set aside with costs. Cause remanded, &c.

C. H. Test, for the appellant.

C. B. Smith, for the appellee.

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PRESUMPTION ON APPEAL.—If an appeal from a justice's judgment was not objected to in the Circuit Court for being taken too late, the Supreme Court will presume—the record not showing the contrary—that the appeal was taken in time.

JURISDICTION OF A JUSTICE.—A justice of the peace has no authority to try titles to real estate.

SAME—TITLE TO LAND.—It does not necessarily follow, because the general issue is pleaded to an action of trespass *quare clausum fregit*, that the title to the land will be the subject of inquiry. (a)

SAME.—Trespass *q. cl. fr.* before a justice, not guilty pleaded, and judgment for the plaintiff. Appeal to the Circuit Court and judgment there for the plaintiff. The subject of inquiry at the trial was not shown by the record.

(a) See cases cited in *Macy v. Allee*, 18 Ind., 126; 7 Ind., 44

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Held, that the Supreme Court must presume, that the title to the land was not in question at the trial.

AMENDMENTS, COSTS OF.—If, on an appeal to the Circuit Court, the statement of demand filed before the justice be amended in substance, the plaintiff must pay the costs which had previously accrued.

ERROR to the *Gibson* Circuit Court.

BLACKFORD, J.—An action was brought by *Wood* against *Sylvester* and *John Maxam* before a justice of the peace. The [*298] following statement of the cause of action was filed: "*James Wood* complains of *Sylvester Maxam* and *John Maxam* or either of them, for taking from off his land on the first of *June* or thereabouts, a quantity of timber, by which he is damaged to the amount of twenty dollars; and therefore he brings suit and prays judgment. *James Wood*." The justice tried the cause on the 10th of *October*, 1835, and gave a judgment for the plaintiff.

On the 13th of *November*, 1835, a justice filed in the clerk's office of the Circuit Court, a transcript of his judgment.

In the Circuit Court, the plaintiff asked leave to amend the statement of his demand so that it might read as follows: "*James Wood* complains of *Sylvester Maxam* and *John Maxam*, for taking from off his land, in the county of *Gibson*, on the first day of *June*, 1835, or thereabouts, a quantity of timber, by which he is damaged to the amount of twenty dollars; and therefore he brings suit and prays judgment. *James Wood*." The defendants objected to this amendment, unless the Court would order the plaintiff to pay the costs which had previously accrued in the suit. The Court permitted the amendment to be made, but refused to make any order on the plaintiff for costs. Judgment in the Circuit Court for the plaintiff.

One objection to these proceedings, made by the defendants, is, that the record does not show when the appeal was taken. But as there was no motion made in the Circuit Court to dismiss the appeal, we must presume, the record not showing the contrary, that the appeal was taken within the prescribed time.

Another objection made is, that as the general issue may be

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considered, under the statute, to have been filed, the title to land was in question, and the justice therefore had no jurisdiction. A justice of the peace, it is true, has no authority to try titles to real estate. Rev. Code, 1831, p. 297. It must be observed, however, that the general issue, in this case, did not necessarily show that the title to land was to be a subject of inquiry. Assuming this to be an action of trespass *quare clausum fregit*, it could not be known by the plea whether the plaintiff would be obliged to prove, as respected the land, any thing more than that he had possession of it when the trespass was committed. The action is founded on possession, and there is nothing, therefore, in the foundation of [*299] the action *which necessarily requires an investigation of the title. 2 Phillip's Ev., 132. The defendants might have a good defense under the general issue, without making any claim to an interest in the land; and unless they made such a claim on the trial, the cause would require no inquiry respecting the title. See *Parker v. Bussell*, and *Smith v. Harris*, Nov. term, 1834. The record does not inform us what took place at the trial of this cause, and we must presume, in favour of the judgment, that no question was there raised relative to the title of the land.

It is further contended by the defendants that the Court upon allowing the cause of action to be amended in substance, by striking out the words "or either of them," should have made the order which was applied for respecting the costs. In this the defendants are correct. They were, under the circumstances of the case, entitled by the statute to an order for the costs which had previously accrued. Stat. 1833, p. 112

Per Curiam.—The judgment is reversed as to the costs, &c., and affirmed as to the residue. To be certified, &c.

W. T. T. Jones, for the plaintiffs.

J. Pitcher, for the defendant.

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ASSESSMENT OF ERRORS.—If evidence be admitted in the Circuit Court without objection, its admission can not afterwards be assigned for error.

JUSTICE OF THE PEACE—JURISDICTION—PRACTICE.—The statement of demand filed before a justice need not show that the justice has jurisdiction of the suit; but if such statement show the justice's want of jurisdiction, the suit will be dismissed.^(a)

SAME.—The want of jurisdiction of the justice may be pleaded, or given in evidence under the general issue.

PRACTICE.—If in replevin before a justice the defendant appear, plead in bar and go to trial, without objecting to the affidavit, he can not afterwards object to it as an affidavit.^(b) But the affidavit, in such case, may
[*300] answer for the statement of demand; and in that character it may be objected to or be amended as other statements of demand.

REPLEVIN—APPEAL—AMENDMENT.—On an appeal in replevin, the plaintiff may, on payment of costs, have leave to amend his statement of demand filed before the justice, by inserting the value of the property.

JURISDICTION.—The justice's jurisdiction in replevin extends to goods the value of which does not exceed fifty dollars.

APPEAL from the *Rush* Circuit Court.

DEWEY, J.—This was an action of replevin commenced before a justice of the peace. On applying for the writ, the appellant, who was the plaintiff below, made his affidavit stating that he was the lawful owner of a certain horse (describing him, but omitting to state his value), and that *Smith* unlawfully detained him. *Perkins*, at the same time, filed before the justice a separate cause of action, which, among other defects, also omitted the value of the horse. The parties appeared before the justice and the defendant pleaded property in himself, and that the horse was worth more than twenty dollars, wherefore the justice could not take cognizance of the cause. A jury trial was had. Verdict and judgment for the plaintiff. Defendant appealed to the Circuit Court. The parties appeared there, and the plaintiff, having proved that the justice did not file the papers with the clerk of that

(a) See *Kiphart v. Brennemen*, 25 Ind., 152.

(b) *Smith v. Emerson*, 16 Ind., 355; 1 Id., 121; 5 Blackf., 278. See *Davis's Digest*, title appearance.

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Court until after the expiration of twenty days from the date of the appeal-bond, procured a rule upon the defendant to show cause why the appeal should not be dismissed. The defendant proved, by the certificate of the justice, that the appeal-bond was not filed with him until a day subsequent to its date, thereby showing that the papers had been filed in season. No objection was made to the admission of the certificate as evidence. The Court refused to dismiss the appeal.

The defendant then moved the Court to dismiss the action, on the ground that it did not "appear from the affidavit or other papers in the cause, what was the value of the horse for which the action was brought," but before that motion was decided, the "plaintiff asked permission to amend his affidavit and cause of action upon the payment of all costs which had accrued up to that time." The Court refused leave to amend, dismissed the action and rendered judgment against the plaintiff for costs. He appeals to this Court.

The causes assigned for the reversal of the judgment [*301] of the *Circuit Court are: 1, The refusal to dismiss the appeal; 2, Not granting leave to amend the cause of action; and 3, Dismissing the suit.

Whether the certificate of the justice, as to the time of filing the appeal-bond before him, was, under the circumstances, admissible evidence had it been objected to, is a question not before us, nor do we decide it. As no objection, however, was made to the competency of the testimony, the Court committed no error in refusing to dismiss the appeal. The evidence of the plaintiff that it had not been filed in due time, was completely rebutted by the certificate.(1)

In considering the other positions of the appellant, it becomes necessary to inquire how far averments, showing jurisdiction, are requisite in the statement of the cause of action filed before justices of the peace? To apply to proceedings before those officers all the technical common law principles, governing pleadings in Courts of inferior and special jurisdiction, would be greatly to countervail the spirit of our legislation on the subject of the duties and jurisdiction

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of justices of the peace. Before 1827, no statement in writing of any cause of action whatever before them was necessary previously to going into trial. The claims of the litigating parties were entirely matters of evidence, without the semblance of pleading. The statute now in force requires that the plaintiff shall file before the justice, previously to issuing process, or at least before going into trial the account, note, &c., or a concise statement of the cause of action on which he intends to rely. The defendant is also required to make a written statement of his defense, if he relies upon affirmative matter: Rev. Code, 1831, p. 301.(2)

It very rarely happens that these causes of action show jurisdiction in the justice, which often depends upon the place where the debt was contracted, the residence of the defendant, and sometimes upon the place at which the process may be served. None of these circumstances appear upon the face of a bond, note, &c. It is true that when the place of contracting the debt, or the residence of the defendant, gives jurisdiction, an averment of the fact may be made in the cause of action; but it evidently is not required, a written instrument between the parties is all the statute exacts. When jurisdiction depends

upon the place of serving process, it is impossible to
 [*302] *make the allegation in the cause of action, before the justice acts upon it. It seems plain that the Legislature, in prescribing the mode of conducting suits before justices, designed that the parties should apprise each other of the ground respectively assumed by them, but that they should be at liberty to do so in a manner entirely stripped of technical forms. And as it is certain, that, in many cases, there may be a good cause of action filed before them without showing jurisdiction on its face; we can see no good reason for embarrassing the practice in their Courts, by distinctions which destroy its uniformity.

In the case of *Thomas v. Winters*, at the last term of this Court, we decided that a defendant before a justice, having failed to plead to the jurisdiction, might, on appeal to the Circuit Court, take advantage of the want of jurisdiction,

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under the general issue. To this principle we adhere; but we conceive the law to be under the statutes of the State, that a defendant in a justice's Court can not, either by motion or demurrer, defeat an action, the cause of which does not appear to be *without* his jurisdiction; or, in other words, because it is not shown to be absolutely *within* it. 3 Blackf., 101. He may plead to the jurisdiction, or disclose the want of it under the general issue.

Before a writ of replevin can legally issue from the Circuit Courts, or justices of the peace, an affidavit is necessary. In the former its sole, and in the latter its first, object is to procure the writ. After appearance and defense to the action, in neither tribunal can an objection be supported to the process on account of the insufficiency of the affidavit. It is then immaterial whether the process was regular or irregular, or, indeed, whether there had been any process at all. In the case before us, the defendant appeared before the justice, pleaded to the action, and went into trial, without making any objection to the affidavit. It was too late for him to do it afterwards, either before the justice, or, after the appeal, in the Circuit Court. As an *affidavit* it had performed its office in the procurement of the writ.

But the affidavit in replevin before a justice of the peace, may also answer for the written statement of the cause of action, because it contains a narration of the injury complained of. In this character it was open to objection, as any other cause of action would have been. The principles [*303] which we have laid down, however, show that the objection which was made to it in the Circuit Court—that it does not show jurisdiction in the justice because the value of the horse is omitted, can not be sustained. That omission does not prove that he had *no* jurisdiction; it left that matter open to inquiry in the investigation of damages for the detention of the horse. It ought no more to subject the plaintiff to a dismissal of his action, than would an account, note of hand, or other cause of action, which might omit to state that the debt was contracted in the township

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where the suit was brought, or that the defendant resided, or the process was served there. Omissions like these, which prove nothing with regard to the jurisdiction of the justice, are very different from a statement in a cause of action which shows that he had no jurisdiction. In such a case, doubtless, his proceedings would be *coram non judice* and void. Such a suit should be dismissed the moment the objection presents itself to the justice, or to the Circuit Court.

Had the affidavit, as a cause of action, needed amendment, the plaintiff was entitled to amend upon the payment of costs. We do not mean to say that the affidavit, as such, could be amended; but in its other character, an averment showing the value of the horse might have been added to it. And, besides, there **was another cause of action** which the plaintiff was entitled to amend, not changing the form of action.

We have said nothing with regard to the plea alleging that the horse was worth more than twenty dollars, and that, therefore, the justice had no jurisdiction; because, if it could have been pleaded together with a plea in bar, it tendered an immaterial issue. The justice's jurisdiction in replevin extends to property worth not more than fifty dollars.(3) And, besides, it could be no reason for dismissing the action on motion.

The Circuit Court erred in refusing the leave to amend, and in dismissing the suit.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. B. Smith, for the appellant.

O. H. Smith, for the appellee.

(1)The failure of the justice to file the papers in time, is no cause now for dismissing the appeal. Stat. 1839, p. 37.

(2)Acc. Rev. Stat. 1838, p. 368. (3)Acc. Rev. Stat. 1838, p. 372.

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REPLEVIN—PLEADING.—In replevin for the unlawful detainer of goods, *non cepit* is not a good plea: the general issue in such case is *non detinet*. (a)

SAME—RIGHT OF POSSESSION.—To sustain replevin, the plaintiff must have a general or special property in the goods, and a right to their immediate possession.

SAME.—A constable levied an execution on certain goods of the debtor, and delivered them for safe-keeping to the creditor. Before the return-day of the execution, and whilst the goods were so situated, the execution and levy were set aside. The constable, afterwards, demanded the goods of the creditor, who refused to deliver them. *Held*, that the constable, for the want of property in the goods, could not maintain replevin for them against the creditor. (b)

ERROR to the *Marion* Circuit Court.

DEWEY, J.—Replevin for the unlawful detention of certain goods and chattels. Pleas, *non cepit*; *non detinet*; property in defendant: property in one *Lang*. Demurrer to *non cepit*, and joinder. Issues upon the other pleas. Demurrer sustained. Issues of fact submitted to the Court, and judgment for plaintiff; exception by defendant.

The facts are as follows: *Walpole* obtained a judgment before a justice of the peace against *Lang*. Execution issued upon it, which was placed in the hands of *Smith*, a constable, to be executed. He levied upon the chattels in dispute, and left them in the possession of *Walpole*. The property belonged to *Lang*. While it remained in the possession of *Walpole*, and before the return-day of the execution, the latter was quashed by the justice, the levy set aside, and the execution recalled; all which appears by the return of the execution made by *Smith*. After these proceedings, *Smith* demanded the property of *Walpole*, and, on his refusal to deliver it to him, brought this action.

The only questions presented for our consideration are, is the plea of *non cepit* well pleaded? and does the evidence show

(a) See *Simcoke v. Frederick*, 1 Ind., 54.

(b) *Dunkin v. McKee*, 23 Ind., 447; *Gardy v. Newby*, 6 Blackf., 442.

such an interest in *Smith* in the goods in contest as to enable him to sustain this suit?

At common law the gist of the action is a tortious taking. That fact of course is put in issue by *non cepit*. But our statute enlarges the remedy, and extends it to unlawful detention of the personal property of another (1). This action is [*305] founded *upon the statute, and the declaration properly conforms to the modified character of the remedy. The unlawful detention is the gist of the action. *Non cepit* tenders an immaterial issue. It was properly overruled by the Court. *Non detinet* is the proper general issue in this form of replevin. Whether it puts in issue any more than the unlawful detention is unnecessary now to be considered.

The other point arising in this case—that of the right of *Smith* under the evidence to sustain the action—is of a more doubtful character.

The books contain a great number of cases in which the right of property has been decided in the various actions of trespass, trover, and replevin. In considering the *kind of interest* necessary to support the latter, some of the decisions have ranked it with trespass, some with trover, and others again have distinguished it from both, classing trover and trespass together. All, however, *American* and *English*, with one exception, have concurred in one point as to the defense in replevin—that property in a stranger is a good plea. The exception is to be found in the argument, rather than adjudication, of the Supreme Court of *New York* in the case of *Rogers v. Arnold*, 12 Wend., 30. It is there contended that in replevin and trover, as well as in trespass, the defense of property in a stranger, to be valid, must go one step further and connect the interest of the defendant with that of the stranger. That this is true in regard to the latter form of action, which is founded upon *possession*, is readily granted; but that the same doctrine can be applied to the two former, which are based upon property, and so admitted to be in the opinion in question, is not so easily perceived.

And it also seems to be no easy task to clear from the charge

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of inconsistency those decisions which have held that mere naked possession, without the right of property general or qualified, is sufficient to maintain replevin, and at the same time have conceded that the plea of property in a stranger, without further averment, is a good defense. To say that possession is *prima facie* evidence of the right of property does not remove the difficulty. As it is only *prima facie*, it may be rebutted and destroyed by testimony showing that the real title is elsewhere. It is not upon the principle that pos-
 [*306] session *is *prima facie* evidence of title, that trespass *de bonis asportatis* can be sustained. It is that the tortious taking of goods is an injury to the possession itself. The right of property, therefore, in that action can only be urged by the true owner, or some one claiming under him. This doctrine we believe not to be applicable to replevin, and that to apply it to that action would be inconsistent with the well settled rule that property in a stranger is a good defense. That trover and replevin can be sustained by bailees presents no difficulty. Bailees have a qualified property in the subject of bailment. It is founded on contract.

But it is unnecessary to pursue this subject and to attempt, by an analysis of the conflicting cases, to preserve the distinguishing feature of the action of replevin in regard to the kind of interest necessary to support it—a task of much labor and some difficulty. The result has been anticipated. This Court has heretofore decided that, to sustain the action, there must be either a general or special property and the right of immediate possession in the plaintiff. 2 Blackf. R., 172; 3 Id., 348. These decisions are fully sustained by the following authorities: 1 Inst., 145 *b*; 18 Vin. Abr., 577, 8, 9; 10 Mod., 25; Selw. N. P., 4th Am. ed., 364; 2 Stark. Ev., 5th Am. ed., 714; 3 Pick., 255; 3 Greenl., 183; 5 Mass., 303.(2)

Smith, by the levy of the execution, acquired a special property in the goods, which continued while the execution remained in force, and ceased when that, together with the levy, was set aside by the justice. With the extinguishment of his special property, his right of action ceased; for a bailor can

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not sue his bailee for a return, after his right of property in the thing bailed has been destroyed. 4 Bingh., 106. So soon as the lien acquired by *Smith* in consequence of his levy was done away, the right of possession reverted to *Lang*, in whom was the general right of property. This event occurred before *Smith* made the demand upon *Walpole* for the goods. At no time before he made the demand had he cause of action, because until then there was no detainer; and he had none afterwards, because his right of property ceased from the time of quashing the execution.

We are of opinion that *Smith* could not sustain this action.

Per Curiam.—The judgment is reversed, and the

[*307] *proceedings subsequent to the issues in fact set aside, with costs. Cause remanded, &c.

J. B. Ray and *W. Quarles*, for the plaintiff.

H. Brown, for the defendant.

(1) Rev. Code, 1831, p. 422; Accord. Rev. Stat. 1838, p. 476.

(2) Vide note to *Litterel v. St. John*, this term, *post*.

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NEW TRIAL.—It is a general rule that a plaintiff, after a verdict against him, can not claim a new trial on account of his having been surprised by the defendant's evidence. (a)

SAME—ABSENT WITNESS—AFFIDAVIT.—On a motion for a new trial, on the ground that certain facts can be proved by a witness who is absent, the affidavit of the witness himself should be produced, or his absence accounted for.

APPEAL from the *Switzerland* Probate Court.

BLACKFORD, J.—Assumpsit by *Walden* against *Cummins* and another, administrators of *Hagan*, for a demand which accrued in the lifetime of the intestate. Pleas, 1st, The general issue; 2d, Payment with notice of set-off. Verdict and

(a) 7 Blackf., 554; 7 Ind., 535; 4 Ind., 171; but see *Todd v. The State*, 25 Ind., 212.

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judgment for the defendants. A new trial was then granted, and a verdict and judgment were rendered for the plaintiff.

The granting of the new trial is the only error assigned.

The new trial was granted on an affidavit made by the plaintiff. This affidavit states that the evidence of one of the defendants' witnesses, who testified that she had heard the plaintiff say that his demand had been paid by the intestate, was a surprise on the plaintiff; that if the plaintiff had known that such evidence would be given, he could have produced a witness to prove a subsequent acknowledgment, by the intestate, of his indebtedness to the plaintiff in the sum of forty dollars; and that the plaintiff expects to be able to procure the attendance of this witness at the next term. The affidavit further states that the plaintiff was surprised by the evidence of two other of the defendants' witnesses, who testified that the mill-race, for the digging of a part of which the suit was

brought, did not exceed from ten to twelve feet in
[*308] width; that the *plaintiff did not expect such evidence, and was not, therefore, prepared with testimony to rebut it; but that he can prove by several witnesses that the average width of the race is at least fourteen feet.

This affidavit does not show any sufficient cause for a new trial. The pleas filed by the defendants were ample notice to the plaintiff that he might expect the defendants to introduce testimony like that which is mentioned in the affidavit. There is nothing in the record to show that the plaintiff had any reason to complain of being surprised by the defendants' evidence. It is a general rule, indeed, that a plaintiff, after a verdict against him, can have no claim to a new trial on account of his having been surprised by any evidence of the defendant. If the plaintiff finds himself unprepared to meet the defendant's evidence he always has it in his power to suffer a nonsuit, which will leave him at liberty to sue again for the same cause of action. It would be giving the plaintiff too great an advantage to permit him to take the chance of a verdict and, when it is lost, to relieve him from the verdict and give him a chance with another jury, merely because the

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evidence against his claim was stronger on the first trial than he expected it would be. This doctrine is fully supported by the following authorities *Price v. Brown*, 1 Strange, 691; *Cooke v. Berry*, 1 Wilson, 98; *Harrison v. Harrison*, 9 Price, 89; *Jackson v. Roe*, 9 Johns., 77.

But there is another objection to the affidavit, independently of the insufficiency of the matter it contains. The affidavit states that the plaintiff can prove certain facts by the witnesses named in it. If the granting a new trial depended upon the plaintiff's satisfying the Court that those facts could be proved, he should have produced the affidavit to that effect of the witnesses themselves. The plaintiff's own affidavit in such cases is not admissible without first accounting for the absence of the affidavits of the witnesses. *Denn v. Morrell*, 1 Hall's R., 382; *Mann v. Clifton*, in this Court, Nov. Term, 1833.

SULLIVAN, J., having been concerned as counsel, was absent.

Per Curiam.—The judgment on the second verdict is reversed, and the proceedings subsequent to the judgment on the first verdict set aside, with costs. To be certified, &c.

S. C. Stevens, for the appellants.

J. Dumont, for the appellee.

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THE STATE v. MEAD.

CRIMINAL LAW—TRIAL BY JURY.—In criminal cases, except petit misdemeanors, &c., the State as well as the defendant may insist on a trial by jury.

SAME—STATE MAY CLAIM.—If the State claim a jury in such criminal case, but the Court notwithstanding try the cause without a jury and acquit the defendant, the trial is a *nullity*, and the cause must be tried again.(a)

ERROR to the *Hendricks* Circuit Court.

BLACKFORD, J.—Indictment for larceny. Plea, not guilty. When the cause was called for trial, the defendant claimed the

(a) See *Joy v. The State*, 14 Ind., 148; *Harman v. The State*, 8 Ind., 545; *Bolton v. Miller*, 4 Id., 262; 2 Id., 37.

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right to have the cause tried by the Court and not by a jury. The prosecuting attorney, on behalf of the State, objected to this claim, and insisted upon having a jury impaneled to try the issue. The Court overruled the the objection of the prosecuting attorney, tried the cause upon its merits without a jury and acquitted the defendant.

We have no doubt but that this proceeding is unconstitutional and void. The language of the constitution of the State is, "That in all criminal cases, except in petit misdemeanors, &c., the right of trial by jury shall remain inviolate." Art. 1, sec. 5. The State is as much entitled to the benefit of this constitutional provision as any individual can be. Whenever the right is claimed by either party, in a case like the one before us, the Court is bound to grant it. The statute authorizing suits, whether civil or criminal, to be submitted to the Court without a jury, can have no application to this case; Rev. Code, 1831, p. 408; because the State, instead of agreeing to a trial by the Court, objected to it in express terms.

The defendant supposes that because he has been acquitted, the State can not subject him to another trial for the same cause. That would be true, if the objection of the State were to a verdict, and the insufficiency of the evidence were the ground of the objection. *Rex v. Praed*, 4 Burr., 2257.(1) But this is a very different case. Here is no verdict, and the objection to the judgment is, that there has been no legal trial. The Court had no authority, under the circumstances, to determine the issue, and the trial is *coram non judice* and absolutely void. The plea of *autrefois acquit* is no bar to a prosecution, if the former indictment was insufficient. *Vaux's* [*310] Case, 4 Co. *Rep. 44. The reason is, because the defendant, in such a case, was not *legitimo modo acquietatus*. For the same reason, the defendant, in the present case, may be tried again. Our constitution, it is true, provides that no person shall be twice put in jeopardy for the same offense. Ind. Const., art. 1, sec. 13. But that provision does not apply to a case where the first trial was a nullity, and where the defendant, of course, was not put in jeopardy by it.

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There has here been a *mis-trial*, and though the defendant has been acquitted, there must be another trial of the cause.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. Herod, for the State.

C. C. Nave, for the defendant.

(1) *Vide* note to *Warren v. The State*, ante, p. 150; *The State v. Davis*, Nov. term, 1837, *post*.

THE STATE, on the relation of HUNT, v. SPENCER and Others, in Error.

DEBT on a sheriff's bond against the principal and his sureties. Breach, the sheriff's failure to return an execution in favour of the relator, &c. Two pleas, as follows: 1, That when the execution came to the sheriff's hands, the execution-defendant had no property within the sheriff's bailiwick whereof to make the money or any part of it, but was then and still continued to be notoriously insolvent. 2, That at the time when the execution came to the sheriff's hands, and at the time when it should have been returned, viz., on, &c., the relator had no interest in the execution or the judgment on which the same issued, nor was he entitled to any part of the money due thereon, &c. *Held*, that these pleas were bad on general demurrer. *Held*, also, that the declaration was bad, it containing no averment of a judgment on which the execution issued.(1)

(1) *Vide The State v. Beem*, Vol. 3 of these Rep., 222; *Hall v. Johnson*, Ibid, 363; *The State v. Youmans*, 1 Ind., 90

[*311] *PRIEST, Administrator, v. MARTIN, in Error.

ASSUMPSIT against an administrator on a promissory note executed by the intestate. Pleas, non assumpsit by the intestate, and failure of consideration. Cause submitted, by consent, to the Court without a jury, and judgment for the plaintiff. *Held*, that the judgment thus rendered takes the place of a verdict, and can be set aside only on the same preponderance of evidence, that would invalidate a verdict.

Held, also, that the judgment against the defendant, in such case, should not be *de bonis propriis*, but to be levied out of the assets of the intestate in the defendant's hands to be administered, if he have so much, but if not, then the costs out of the defendant's own goods. See 5 Blackf., 108; 12 Ind., 187, 112, 242.

BLAKE v. NICHOLS.

CERTIFICATE OF JUSTICE.—If there be a justice's certificate attached to a plea in abatement, stating that the plea had been sworn to before him the plea must be considered, under the statute, as sufficiently verified.

SAME—AMENDMENT OF.—If such certificate be imperfect, and the plea have been properly sworn to, the Court should permit the justice to amend the certificate.

APPEAL from the *Hendricks* Circuit Court.

BLACKFORD, J.—*Nichols* sued *Blake* before a justice of the peace on a promissory note. The defendant pleaded in abatement, that there was a prior action pending between the parties, for the same cause, before another justice. The *jurat* at the bottom of the plea was as follows: "Sworn to before me. November 14th, 1835. Noah Harding, J. P." The plea was objected to before the justice, on the ground that it did not appear to be properly verified by affidavit. The justice

overruled the objection, tried the cause, and rendered a judgment for the plaintiff.

The defendant appealed to the Circuit Court. The plaintiff renewed his motion there to set aside the plea, and the Circuit Court sustained the motion. The defendant then [*312] suggested *that the plea had been properly sworn to, and asked leave for the justice then, in open Court, to amend his certificate. The amendment was refused, and the plaintiff obtained a judgment.

The plea, in this case, is not verified conformably to the *English* practice. The statute of *Anne* requires such a plea to be verified by affidavit; and the practice under that statute is, to annex to the plea an affidavit signed by the person making it, stating the plea to be true in substance and fact. 3 Chitt. Pl., 897.

Our statute states that pleas in abatement shall not be received, unless they are supported by oath or affirmation. Rev. Code, 1831, p. 316. This provision is not in terms the same with that in the *English* statute, and does not require that an affidavit signed by the person making it, shall be made and annexed to the plea. A magistrate's certificate annexed to the plea, stating the plea to have been sworn to before him, is all that is necessary under our statute. In the present case there is such a certificate, and the plea must therefore be considered to be sufficiently verified.

If, however, the Circuit Court were correct in supposing that the *jurat* did not show the plea to be properly verified, they committed an error in refusing to permit the justice to amend his certificate. It was proper that the certificate should state the truth of the case, and the justice ought to have been permitted to correct any mistake which it contained. *Bosc v. Solliers*, 4 Barn. & Cress., 358.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Cowgill and *C. P. Hester*, for the appellant.

C. C. Nave, for the appellee.

Dixon v. The State.

DIXON v. THE STATE.

INDICTMENT—ESTRAY.—An indictment charging a person who has taken up an estray, with not complying with the provisions of the statute on the subject, must state the particular acts which the defendant has omitted to perform.

[* 313] *ERROR to the *Posey* Circuit Court.

BLACKFORD, J.—Indictment against *Dixon*. The charge is, that on the 10th of *May*, 1835, the defendant, at, &c., took up as an estray a certain horse, &c., and that from the said 10th of *May*, to the finding of the indictment, he continued to keep said estray, at, &c., and has continued to fail, neglect and refuse, to comply with any of the provisions of the statute, entitled “An act regulating the taking up of animals going estray,” &c., contrary to the form of the statute. Plea, not guilty, and verdict for the State. Motion in arrest of judgment overruled, and judgment on the verdict.

The objection made to this indictment is, that it does not set out the particular act or acts which the defendant omitted to perform. This objection is fatal. The mere charge against a person who has taken up an estray, that he has failed, neglected and refused, to comply with any of the provisions of the statute, is not sufficient. The particular acts omitted to be performed must be stated in the indictment, in order that the Court may see whether they are such acts as are required by the statute to be performed. The motion in arrest of judgment should have been sustained.

Per Curiam.—The judgment is reversed. To be certified, &c. *W. T. T. Jones* and *J. R. E. Goodlet*, for the plaintiff.

W. Quarles and *J. Pitcher*, for the State.

WATSON v. NEW, in Error.

IN a suit commenced before a justice of the peace, by the assignee against the assignor of a promissory note, the plaintiff need only file, as a cause of action, the note with the assignment. R. Code, 1831, p. 301; Rev. Stat., 1838, p. 367; 8 Blackf., 304.

FOOT v. GLOVER.

COMPLETE RECORD—EVIDENCE.—To prove what the question in issue in a previous suit was, the complete record of the suit, and not a detached special plea filed in it, must be produced.(a)

[*314] *ERROR to the *Monroe* Circuit Court.

BLACKFORD, J.—This was an action of slander in which *Glover* was the plaintiff and *Foot* the defendant. The words for which the suit was brought were, that the plaintiff had sworn false in an affidavit, which he had made for the continuance of a certain cause, in which he was a defendant and *Foot* the plaintiff. To this action of slander, the defendant pleaded in justification that the words were true; and upon this plea issue was joined.

On the trial of the cause, it became material for the plaintiff to show what had been the matter in issue between the parties in the previous action, in which the affidavit was made. To give the jury that information, the plaintiff offered in evidence the following plea:

“*Glover et al. ats. Foot.* And the said defendants, by their said attorneys, for further plea say, that said suit ought not to be sustained further than as hereinafter admitted, because they say that the said defendants, on the 11th day of *March* in the said declaration mentioned, before ten o'clock in the morning,

(a) *Cline v. Gibson*, 23 Ind., 11.

Foot v. Glover.

viz., at nine o'clock in the morning of the said day, at the court house in *Bedford*, had ready to deliver and tendered to said sheriff of the said *Lawrence* county, the three horses and the wagon mentioned in the said declaration, which were of the value, and would have raised the sum, of \$200 of the amount thereof, and that the said sheriff altogether failed and neglected to attend to receive the said horses and wagon. And as to the residue of the said goods and chattels, the said defendants admit the failure to deliver the same according to the tenor of the said obligation, and confess that they can not gainsay the action of the said plaintiff for the said residue, and that the said plaintiff has sustained damage thereby to the value of the moneys in the said execution contained, over and above the said \$200, together with the damage in addition thereto, according to the statute in such cases made and provided. And this they are ready to verify."

The plea was endorsed as follows: "Filed the 29th of *August*, 1826." The admission of this plea as evidence was objected to, and the objection was sustained. Verdict for the defendant. *Glover*, the plaintiff, moved for a new trial, and the Circuit Court, supposing that they had committed an error in rejecting the plea offered in evidence by the [*315] plaintiff, *granted a new trial. The cause was accordingly again tried, and the plaintiff obtained a verdict and judgment. The granting of the new trial is the only error assigned.

This judgment must be reversed. The Circuit Court was right in rejecting the plea offered in evidence on the first trial of the cause. The plea was offered in evidence to show what the matter in issue in the previous cause was, at the time the affidavit was made. But this special plea, detached as it is from the other proceedings in the suit, is no evidence as to what was the matter in issue in that suit. The plea may have been withdrawn, or it may have been adjudged insufficient on demurrer, before the affidavit was made. It is necessary to see the complete record of a suit, in order to ascertain what the question in issue in such suit was.

Cooper v. The State, on the relation of Dean.

The new trial ought not to have been granted.

DEWEY, J., having been concerned as counsel in the cause, was absent.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the verdict for the defendant exclusive set aside, with costs. Cause remanded, &c.

J. Whitcomb, for the plaintiff.

J. H. Thompson and *C. P. Hester*, for the defendant.

MINTON v. MOORE, in Error.

IF the subject of difference in a suit pending in the Circuit Court be referred to arbitration, the award, if no time for making it be fixed, should be returned to the next term of the Court; and if it be not so returned, the plaintiff may have the cause tried as if no reference had been made.

If neither party, on appeal to the Circuit Court, require a jury, the cause may be tried without a jury, though the amount in controversy exceed twenty dollars. Rev. Code, 1831, p. 318. (Acc. Rev. Stat., 1838, p. 384.) See 2 Ind., 535; 5 Blackf., 333.

DEWEY, J., having been concerned as counsel, was absent.

[*316] *COOPER v. THE STATE, on the Relation of DEAN.

BASTARDY—WHO MAY COMPLAIN.—Any unmarried woman, resident in the State, may make complaint before a justice, under the statute, against the father of her bastard child, without regard to the place where the child was born.

SAME—NON-PAYMENT, ETC., BY FATHER.—The Court, in ordering the father of such child to make certain payments for its maintenance, should not direct an execution to issue in case of non-payment.

SAME.—Upon an order for such payments, a *scire facias* or an action of debt may be sustained by the party entitled to the money.

Cooper v. The State, on the relation of Dean.

ERROR to the *Harrison* Circuit Court.

BLACKFORD, J.—A justice of the peace filed in the Circuit Court the proceedings which had taken place before him in a case of bastardy. The complaint is by the State, on the relation of *Malinda Dean*, the mother of the child, against *William Cooper*, the reputed father. The mother was resident in this State when the complaint was made, and the child was begotten in this State, but was born in the State of *Kentucky*. The cause was tried in the Circuit Court on the plea of not guilty, and a verdict found against the defendant. Upon this verdict the Court ordered that the defendant should pay certain sums of money, at certain periods, for the maintenance of the child. It was further ordered, that an execution should issue for the payments as they respectively became due, and the amount be paid to the mother of the child.

There are two objections to these proceedings which it is necessary to notice.

The first is, that as the child was born in the State of *Kentucky*, the Court had no jurisdiction of the cause. This objection is without foundation. The statute authorizes any unmarried woman, resident in the State, to make complaint against the father of her bastard child, without regard to the place where the child was born. Rev. Code, 1831, p. 285.(1)

The other objection is to that part of the order of the Court which directs an execution to issue on the payments as they respectively become due, &c. We think the Court has made a mistake as to this matter. The party who may be entitled to any one of the payments when it becomes due, may have a *scire facias* or an action of debt for the same, and the order, if unreversed at the time, will be conclusive evidence [*317] of the *amount being due from the reputed father.

Harrington et al. v. Ferguson, May term, 1827. But it is not proper, that an execution should issue upon the order, until the defendant has had an opportunity to show that the person for whose use it issues, is not the one entitled to the money.(2)

DEWEY, J., having been concerned as counsel, was absent.

Traylor and Another v. Horrall.

Per Curiam.—That part of the order directing an execution to issue, &c., is reversed, and the residue affirmed. To be certified, &c.

J. W. Payne, C. Fletcher and O. Butler, for the plaintiff.

W. Quarles, for the State.

(1) Accord. Rev. Stat., 1838, p. 330.

(2) The order stands now as a judgment; the sureties for its performance are entered of record in the nature of replevin-bail; and when an instalment becomes due, execution goes against the principal and sureties. Rev Stat., 1838, p. 333.

TRAYLOR and Another v. HORRALL.

TROVER—EVIDENCE TO SUSTAIN.—To support the action of trover, there must be proof of property in the plaintiff, possession to have been in the defendant, and a conversion by the defendant.

SAME.—The *gist* of such action is the conversion; and unless the defendant has had an actual or virtual possession of the goods, he can not be charged with a conversion of them to his own use.

ERROR to the *Daviess* Circuit Court.

BLACKFORD, J.—Trover by *Horrall* against *Traylor, Capehart and Cain*. Plea, not guilty. The only evidence respecting the conversion was as follows: The plaintiff had put his corn into a crib, which he had hired for the purpose, of *Kinman*, and which stood on *Kinman's* land. The defendants and some other persons being present where the crib of corn was, *Capehart* offered the corn at public sale, and *Traylor* bid it off at the price of thirty-one dollars. *Cain* said that he had the officers bound for his money. The plaintiff was also present, and forbid any person from selling or

[*318] removing the corn, *claiming it to be his. *Cain*

Afterwards said that he had got his money from *Capehart*. The defendants demurred to the evidence, and agreed that if judgment were rendered for the plaintiff, the

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Court might assess the damages. The demurrer was sustained as to *Cain*, but there was a judgment against the other defendants, for seventy-four dollars in damages, together with costs.

We are satisfied that the record shows no evidence conducing to prove a conversion in this cause, and that the judgment for the plaintiff is consequently erroneous

To support the action of trover, there must be proof of property in the plaintiff, possession to have been in the defendant, and a conversion by the defendant. *Buller's N. P.*, page 33. The *gist* of the action is the conversion; and unless the defendant has had an actual or virtual possession of the goods, he can not be charged with a conversion of them to his own use.

In the present cause, it does not appear why the form of a public sale of the corn in question took place. It is not shown that *Capehart*, the alleged seller, had seized the property under any process of law, or that at the time of the sale, or at any other time, he had or pretended to have any possession of it whatever. Neither was there any attempt to prove, that *Traylor*, the purchaser, ever took possession of the property, or exercised any act of ownership over it.

The case of *Bristol v. Burt*, 7 Johns. Rep., 254, is referred to by the plaintiff. But the Court there expressly say, that the defendant had exercised the highest and most unequivocal acts of dominion and control over the goods, not only by claiming jurisdiction over them, but by placing armed men near them to prevent their removal. They say further, that the defendant thus detained the goods for several months, and that a charge was therefore brought upon the plaintiff. The Court, in that case, do not appear to have had any idea, that the suit could be maintained without showing that the defendant had intermeddled with the goods, and had for a time excluded the plaintiff from their possession. They rely on *Baldwin v. Cole*, 6 Mod. Rep., 212. The plaintiff had there sent his servant with some tools to work in the queen's yard for hire. The plaintiff, some time afterwards having taken away his servant, sent for the tools, but the defendant

[*319] refused *to deliver them up. Trover was then brought for the tools, and the action was sustained on the ground, that, as the defendant had wrongfully undertaken to detain them, he took upon himself the right to dispose of them, which was a conversion. The case in 6 Mod. Rep., is settled law, and being relied on in *Bristol v. Burt*, it shows the ground upon which the latter case was intended to be placed by the Court.

In *M'Combie v. Davies*, 6 East, 538, the plaintiff, by his agent, bought some tobacco which was in the King's warehouse; but the agent took the transfer of the tobacco on the warehouse books in his own name. The agent afterwards pledged the tobacco in his own name with the defendant, and transferred it into the defendant's name on the books in the warehouse. The plaintiff demanded the tobacco of the defendant, who refused to deliver it up until the debt for which it was pledged should be paid. The plaintiff then sued the defendant in trover for the tobacco. It was strongly contended at the trial that there had been no conversion; and the plaintiff was nonsuited. The nonsuit, however, was subsequently set aside and the plaintiff recovered. In that case the defendant, by the transfer to him on the dock books, had the virtual possession and exclusive control of the property, and he wrongfully refused to deliver it to the rightful owner.

In a subsequent case, Chief Justice *Best* took occasion to say, that Lord *Ellenborough*, in *M'Combie v. Davies*, had gone to the extreme verge of the law; that as far as that he should go himself; but that in the case before Lord *Ellenborough*, the state of the property was changed, because there had been a transfer in the dock books, which, it was well known, is as much a transfer for the purposes of trade, as an actual removal from one warehouse to another; and that there was, in that case, the exercise of dominion over the goods. *Mallalieu v. Laugher*, 3 Carr. & Payne, 551..

The cause which we are now to decide is very different from any of those to which we have referred. For any thing that the record before us presents, the plaintiff may have always

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continued in the undisturbed possession of the corn in the place where he originally deposited it, or he may have sold it, or have otherwise converted it to his own use.

DEWEY, J., having been concerned as counsel in the cause, was absent.

[*320] *Per Curiam*.—The judgment, &c., against the plaintiffs in error is reversed with costs. Cause remanded, &c.

S. Judah, for the plaintiffs.

D. M'Donald, for the defendant.

BOXLEY and Others v. COLLINS

FORCIBLE DETAINER.—The complaint in a case of forcible detainer, must show that the land is within the county, and that the detainer is unlawful.

SAME.—The verdict for the complainant in such case, must state that the premises are detained *by force*.

VENTRE DE NOVO.—If no judgment can be rendered in consequence of the imperfection of the verdict, the Court awards a *venire de novo*.

APPEAL from the *Hamilton* Circuit Court.

BLACKFORD, J.—The appellee filed a complaint on the 4th of *April*, 1835, before two justices of the peace, against the appellants for a forcible detainer of certain real estate. The appellants pleaded not guilty. Verdict before the justices for the appellee, and a judgment on the verdict. There was an appeal to the Circuit Court, and the appellee again obtained a verdict and judgment.

In the Circuit Court, a motion was made by the appellants to set aside the complaint, but the motion was overruled. This complaint, after stating the title of the Court and the names of the parties, says:

“The plaintiff complains of the defendants, that they made a lawful entry upon the east half of the south-east quarter of section twenty-two, town twenty north, range three east; and

that they, on the second of *April*, 1835, with force and strong hands did deforce, and still do keep out of the possession of the said premises, him, the said plaintiff, he being the rightful owner of the same. And the plaintiff prays that he may have the benefit of the act of forcible entry and detainer, in such cases made and provided."

This complaint is objectionable on two grounds. First, because the land is not shown to be within the county; and, secondly, because there is no averment that the [*321] detainer was *unlawful. The land may have belonged to the appellee, and still the appellants may have had, at the time, a right to the possession; and if their possession was lawful, it might be maintained by force. *King v. Oakley*, 4 Barn. & Adolp., 307, per *Denman*, C. J.

There was a motion in the Circuit Court to arrest the judgment on account of the insufficiency of the verdict, but the motion was overruled. The verdict is as follows:

"At an inquisition held before the Circuit Court of *Hamilton* county, State of *Indiana*, at the *April* term, we the jurors, on our oath find that the following described land, viz., the east half of the southeast quarter of section twenty-two, town twenty, range three east, on the 29th of *April*, 1835, was in the lawful and rightful possession of *Robert Collins*; and that *Addison Boxley*, *Thomas P. Boxley* and *George G. Boxley*, being lawfully upon the same, did unlawfully detain the possession from him, the said *Robert Collins*, and still continue unlawfully to detain the possession from him. Wherefore the jury upon their oath as aforesaid find, that the said *Robert Collins* ought to have restitution thereof without delay."

This verdict is defective, because it does not state that the possession of the premises was detained by force. The mere unlawful detainer of land, furnishes no ground for a prosecution under the statute against forcible entries and detainers. This summary and extraordinary proceeding to obtain possession of real estate, by the interference of justices of the peace, is founded upon statute both in *England* and in this country, and is only authorized where the entry or detainer is, in its

nature, forcible and violent. In ordinary cases—those of entries or detainers peaceable but unlawful—the injured party is left to the action of ejectment, &c. A distinguished writer uses the following language on this subject: “To constitute a forcible entry, or a forcible detainer, mere force *in law*, as it is technically termed, being a simple trespass, is not sufficient, but there must be some *actual violence*, or some proceeding, as *a large assembly of persons*, calculated to create *alarm*, if not *terror*, in ordinary minds, though it is not necessary that there should be any assault or battery.” 2 Chitt. Gen. Prac., p. 234.

In our statute, the form of a verdict against the defendant for a forcible detainer is given, which is as follows: “That the lands, &c., on, &c., were in the lawful and rightful [*322] possession *of the complainant, and that the defendant being lawfully upon the same, did, unlawfully *with force and strong hands*, expel and drive out the plaintiff; and that he still continues wrongfully to detain the possession from the plaintiff. Wherefore the jury, upon their oath, find that the plaintiff ought to have restitution thereof without delay.” Rev. Code, 1831, p. 267.

It is clear, that the verdict in the cause before us is defective, and that the judgment should have been arrested. In such cases—where no judgment can be rendered in consequence of the imperfection of the verdict—the Court awards a *venire de novo*. Gould on Pleading, p. 526.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the motion respecting the complaint set aside, with costs. Cause remanded, with leave to the appellee to amend the complaint.

C. Fletcher and *O. Butler*, for the appellants.

W. Quarles and *H. Brown*, for the appellee.

Hackleman, Administrator, v. Miller and Another.

HACKLEMAN, Administrator, v. MILLER and Another.

ADMINISTRATOR, WHEN PERSONALLY LIABLE.—If a third person be induced to purchase the assignment of a note due from an intestate's estate, by the promise of the administrator that it shall be paid, the promise is not within the statute of frauds, and the administrator is personally liable to the assignee.(a)

ERROR to the *Fayette* Circuit Court.

BLACKFORD, J.—This was an action of debt commenced in October, 1834, before a justice of the peace. The defense relied on was a certain matter of set-off. The justice gave judgment for the defendants.

In the Circuit Court, the parties filed the following agreed case, on which the defendants obtained a judgment:

“*James Hackleman*, administrator, v. *Abraham Boys*. and *Samuel Miller*. The plaintiff, being at the time administrator of the estate of *Joseph Moffitt*, deceased, sold at public auction, agreeably to law, in the administration of the estate, goods and chattels which he had inventoried, to *Miller*, one of the defendants, to the amount of the note on which the [*323] suit is *brought, and for which he executed the note with *Boys* as his surety. The note reads as follows: ‘\$14.94. *Connersville, Ind.*, 12 months after date, for value received, we or either of us promise to pay *James Hackleman*, administrator of the estate of *Joseph Moffitt*, deceased the sum of 14 dollars and 94 cents. Witness our hands and seals this 12th of Oct., 1833. *A. Boys*, (Seal). *Samuel Miller*, (Seal).’ The instrument of writing filed as a set-off is in these words: ‘Dec. 16, 1833. This day settled and found the estate of *Joseph Moffitt* due to *Julius Whitmore*, in the sum of 13 dollars and 47 cents, which will be paid as the law directs. *James Hackleman*, administrator of the estate of *Joseph Moffitt*, deceased.’ Which instrument is thus indorsed: ‘April 5, 1134, I, the undersigned, do hereby transfer my right in the

(a) *Spooner v. Dunn*, 7 Ind., 81.

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within note to *S. Miller. Julius Whitmore.* And the same was executed by the plaintiff, as it purports to be, on a settlement of the account between the estate of *Moffitt* and the assignor; and the assignment was before the commencement of this suit. Before *Miller* received the assignment, the plaintiff informed him that it was good, and that he would receive the full face of it in set-off against the note on which this suit is brought, if the assignment were made. The plaintiff acknowledges the receipt of all that the note calls for, before suit brought, with the exception of the amount of the said set-off."

The statement also contains some remarks relative to the probable insolvency of the estate of *Moffitt*, which it is not necessary to notice.

The only question here involved is, whether the promise of the plaintiff to admit the set-off as binding on him, or whether it is void as being within the statute of frauds?

The words of the statute are: "No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate, or whereby to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriage of another person, &c., unless the agreement, &c., shall be in writing," &c. Rev. Code, 1831, p. 269.(1) The plaintiff sues in his own right, the words administrator, &c., attached to his name being only matter of description; and the set-off, to be admissible, must be a valid demand against him personally. The objection made by the plaintiff to the validity of his [*324] promise to *admit the sett-off is, that it goes to charge him personally for a debt of the estate, and ought, therefore, to have been in writing.

There is some difficulty in coming to a satisfactory opinion on this subject; but we are disposed to believe that the promise is not within the mischief intended to be remedied by the statute. It is settled, "that if *A* says to *B*, pay so much money to *C* and I will repay it to you, it is an original, independent promise; and if the money be paid upon the faith of it, it has always been deemed an obligatory contract, even

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though it be by parol; because there is an original consideration moving between the immediate parties to the contract." Per *Story, J.*, in *Townsley v. Sumrall*, 2 Peters, 182.

There can be no doubt but that, under our statute, the writing filed as a set-off is assignable; and we have heretofore decided that the amount of the note is *prima facie* evidence that that was the sum paid for the assignment. *Youse v. MCreary*, May term, 1829. It must be taken for granted, therefore, in this case; the contrary not appearing, that the defendant paid *Whitemore* for the assignment, the amount of the instrument assigned; and the record shows that the assignment was obtained by the defendant, at the instance of the plaintiff, and upon the faith of his express promise that the amount should be allowed to the defendant. The payment, thus made, is a damage to the defendant, and is a valid consideration for the promise in question made by the plaintiff.

The case of *Townsley v. Sumrall*, to which we have already referred, so far as respects the present cause, is as follows: *Townsley* verbally promised *Sumrall* that, if the latter would obtain from one *Waters* a bill of exchange for a certain sum, to be drawn by *Waters* upon *Townsley* in favour of *Sumrall*, he, *Townsley*, would accept the bill. *Sumrall*, accordingly, for a valuable consideration, procured such a bill from *Waters*, but *Townsley* then refused to accept it, having in his hands no funds of the drawer. *Sumrall* then sued *Townsley* on his promise to accept the bill, and the defendant contended that the promise, not being in writing, was void. The Court decided the promise to be valid, and said "that if a person, in consideration that another will purchase a bill already drawn, or to be thereafter drawn, and as an inducement to the purchase, undertake to accept it, and the bill be drawn [*325] and *purchased upon the credit of such promise, for a sufficient consideration, such promise to accept is binding upon the party; it is an original promise to the purchaser, and not merely a promise for the debt of another."

This case of *Townsley v. Sumrall*, is, in principle, similar to the one before us.

M'Connell v. Baker.

Per Curiam.—The judgment is affirmed with costs *de bonis propriis*. To be certified, &c.

O. H. Smith, for the plaintiff.

J. Perry and S. W. Parker, for the defendant.

(1) Accord. Rev. Stat., 1838, p. 311.

M'CONNELL v. BAKER.

CONTRACT—PLEADING.—The declaration in assumpsit stated, that the plaintiff had bought of the defendant all the fat hogs which the defendant then had, supposed to be about 530, at three dollars and twelve and one-half cents per cwt., to be delivered, &c.; but that the hogs had not been delivered, &c. Held, that the declaration was bad on general demurrer, for not averring some particular number of hogs, with their weight, which the defendant had when the contract was made.(a)

ERROR to the *Fayette* Circuit Court.

BLACKFORD, J.—This is an action of assumpsit. There are two special counts, stating that the plaintiff had bought of the defendant “all the fat hogs which the defendant then had, supposed to be about 530 hogs, at the rate or price of three dollars and twelve and one-half cents per cwt. gross weight for the said hogs;” to be delivered afterwards, &c.; but that the said hogs had not been delivered, &c. There are also two general counts; one for money had and received, and the other for money lent and advanced. General demurrer to the special counts, and the demurrer sustained. To the other counts, the general issue was pleaded, and the plaintiff, on the trial, recovered a judgment. The plaintiff below is the plaintiff in error.

The only question raised in the cause is, could the special counts be sustained, without an averment of the number and weight of the hogs which were to have been delivered?

We think these counts are substantially defective.
[*326] The *contract declared on is for the delivery of all

(a) *Galling v. Newall*, 9 Ind., 572; *Patterson v. Fisher*, 8 Blackf., 237.

Litterel v. St. John.

the fat hogs which the defendant then had, supposed to be about 530 hogs, at the price of three dollars and twelve and one-half cents per cwt.; and the breach assigned is, that the said hogs were not delivered according to contract. The counts are defective, because there is no averment of any particular number of hogs with their weight, which the defendant had when the contract was made. In actions of this kind—for the non-delivery of goods—the value of the goods must be proved on the trial, or the jury have no rule by which to estimate the amount of damage for their non-delivery; and this shows, that a value must be stated in the declaration, because the plaintiff is only bound to prove the facts which he alleges. The *true* value need not be averred, but some value must.

Reverse the case, and suppose the suit were brought for the price of hogs sold and delivered by the plaintiff to the defendant, supposed to be 530 hogs, at three dollars and twelve and one-half cents per cwt.; could a declaration, not averring the number and weight of the hogs, be sustained? It certainly could not; and the obvious reason is, that the amount due to the plaintiff, admitting his statement to be true, would not be shown by the declaration. The averment is as necessary in the one case as in the other.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

C. B. Smith and *S. W. Parker*, for the plaintiff.

O. H. Smith, for the defendant.

LITTEREL v. ST. JOHN.

REPLEVIN—DEMAND—PLEADING.—Replevin for the detainer of a horse.

Plea, property in defendant. Replication in denial, and issue. It appeared that the plaintiff had bought a horse of the defendant, but that the latter still had him in possession. *Held*, that these facts did not necessarily show that the issue must be found against the plaintiff, unless he had proved a demand and refusal of the horse.

Litterel v. St. John.

CONTRACT—CONDITION PRECEDENT.—A horse was purchased for eighty dollars, but neither the property nor possession was to pass until the purchaser had executed a note for the price. A note for only eight dollars was, by mistake, executed and delivered in pursuance of the contract. *Held*, that the property in the horse was not changed.

[*327] APPEAL from the the *Union* Circuit Court.

BLACKFORD, J.—This was an action of replevin for a horse, commenced by *St. John* against *Litterel*. The declaration states that the defendant was lawfully in possession of the horse, but that he unlawfully detained him from the plaintiff, &c. Plea, property in the defendant, concluding with a verification. The replication denies the plea, and concludes to the country.(1) Verdict and judgment for the plaintiff.

Evidence having been given on the trial, relative to a purchase of a horse by the plaintiff from the defendant, and the testimony being closed, the defendant asked the Court to give the following instruction to the jury: "That if they believed from the evidence, that the horse was purchased by *St. John* of *Litterel*, and that the latter had never parted with the possession, the jury must find for the defendant, unless, before the commencement of the suit, the plaintiff had demanded the horse, and the defendant had refused to deliver him, or had otherwise tortiously detained him." This instruction the Court refused, but instructed the jury that, under the issue, the suit could be sustained without proof of a demand.

There is no error in this part of the cause. The only question to be tried was, did the horse belong to the defendant? It certainly did not follow, because the plaintiff had bought the horse of the defendant, and the latter had not given possession, that the horse continued to be the defendant's property until the plaintiff demanded him. It does not appear that a demand was indispensable to a change of the property; and we must presume, in favour of the opinion of the Court, that it was not. We are, however, not to be understood as supposing, that the defendant might not, by some other plea, have put the plaintiff upon proof of a demand of the horse. All we say is, that the issue in this case does not require that proof from the plaintiff.

Litterel v. St. John.

The defendant also asked the following instruction; "That if it was agreed between the parties, that *St. John* was to give his note for eighty dollars for the horse, before he was entitled to the property or possession of him, and a note was executed for eight dollars, instead of eighty dollars, by a mistake of the parties, and *St. John*, knowing of the mistake, did not, before the commencement of this suit, execute and tender to *Litterel* a corrected note for eighty dollars, agreeably to the contract, he can not sustain this action." This instruction was [*328] refused; but the *Court charged the jury, "that if such note was executed by mistake, the plaintiff could recover, if it was proved that the plaintiff had been always ready, upon demand, to correct the mistake."

The instruction thus given by the Court can not be sustained. It refers to, and recognizes as proved, the facts contained in the last instruction which was refused. The execution of a note for eighty dollars by the plaintiff to the defendant, was a precedent condition, to be performed before the right of property or of possession in the horse was to vest in the plaintiff. That condition has not been complied with. It is not sufficient for the plaintiff to say, that, when he discovered the mistake relative to the note, he was ready, on demand, to correct it; that is not a performance of his part of the contract.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

O. H. Smith and *C. B. Smith*, for the appellant.

J. Ryman and *J. Perry*, for the appellee.

(1)According to the rules of pleading in replevin, the plea of property in the defendant concludes with a verification. The replication affirms the property to be in the plaintiff, and concludes to the country. *Gilb. on Repl.*, 228, 229. *Vide* forms of these pleas of property, in a note to *Martin v. Ray*, Vol. 1 of these Rep., 292, 3. The following is the form of the replication: "And the said *M.* says, that his writ and declaration aforesaid ought not to be quashed, because he says, that the property of the cattle aforesaid, at the time of the taking of them, was in the said *M.* in manner and form, as he by his writ and declaration aforesaid hath above thereof alleged, to-wit, at *H.* aforesaid in the county aforesaid; and this he prays may be inquired of by the country." *Lill. Ent.*, 358; *Gilb. on Repl.*, 229.

The State v. M'Clure.

THE STATE v. M'CLURE.

DISINTERMENT OF CORPSE—INDICTMENT.—The disinterment of a corpse is indictable, if it be done without either the consent of the deceased given in his life-time, or of his near relations given subsequently to his death.

SAME.—The indictment, in such case, need not allege the disinterment to be unlawful.

ERROR to the *Marion* Circuit Court.

BLACKFORD, J.—Indictment for disinterring a corpse. The indictment charges that the defendant, on &c., &c. [*329] &c., did *then and there remove the dead body and corpse of one *Polly White*, from interment in a public burying ground, in which she had been then and there interred, without having obtained the consent therefor of the said *Polly* in her lifetime, nor of her near relations since her death, contrary to the form of the statute, &c.

This indictment, on the defendant's motion, was quashed.

The defendant contends that the indictment should have averred that the disinterment was without the consent of the near relations of the deceased, given *before* her death; but the objection is without foundation. We consider the disinterment to be indictable, if it was done without the consent of the deceased, given in her lifetime, or of her near relatives, given *subsequently* to her death. Rev. Code, 1831, p. 188.(1)

The defendant further contends, that the indictment should have alleged the disinterment to be unlawful; but the term "unlawful" is not used in the statute, and there could be no reason for inserting it in the indictment. 1 Chitt. Crim. Law, 241.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. Quarles, for the State.

J. Morrison, for the defendant.

(1) Accord. Rev. Stat., 1838, p. 213.

 Davis v. Bush.

RYMAN v. CLARK, in Error.

A *FIERI FACIAS* was issued by a justice of the peace and dated on the 21st of *July*, 1836. *Held* that the thirty-six days from the date of the execution, within which the constable was bound to return it, expired on the 25th of *August*, 1836; and that, therefore, a *scire facias* against the constable, dated on the 26th of *August*, 1836, for not returning the execution, was not objectionable as having issued too soon. *Jacobs v. Graham*, 1 Blackf., 392; *Arnold v. The United States*, 9 Cranch., 104; 5 Blackf., 320; 5 Ind., 196; 9 Ind., 6.

[*330]

*DAVIS v. BUSH.

FALSE IMPRISONMENT—JUSTIFICATION.—It is not necessary to a constable's justification of an arrest, under a *capias ad respondendum*, issued by a justice, that the writ be preceded by an affidavit. *Aliter*, if the justification be by the party or by the justice.

SAME—RETURN OF WRIT.—When an officer justifies an arrest under process which he is bound to return, the return-day being past, the plea must allege a return.(a)

SAME—PLEADING.—If to a declaration in trespass, containing several counts, the introductory part of a plea in justification be confined to the first count, and an attempt be made in the body and conclusion of the plea to embrace the whole declaration, the plea is bad.

ERROR to the *Tippecanoe* Circuit Court. The plaintiff in error was the plaintiff below; the demurrer to the special plea was overruled, and the judgment was for the defendant.

DEWEY, J.—This is an action of assault and battery and false imprisonment. The declaration contains three counts. Pleas, general issue and justification, as a constable, under a *capias ad respondendum* issuing from a justice of the peace.

 (a) *Ewing v. Robeson*, 15 Ind., 26; *May v. Stuy*, 5 Blackf., 206.

Demurrer to the special plea, assigning for cause, 1st, The plea does not show that an affidavit was filed before issuing the writ, nor does the writ recite one; 2d, It does not allege how long the plaintiff was detained; and, 3d, It is not averred that the constable carried the plaintiff before the justice, or that he returned the writ.

The points actually arising under the demurrer, resolve themselves into two—the necessity of averring the existence of an affidavit before issuing the writ, and the return of the process.

The *capias* set out in the plea agrees, in substance, with the form prescribed by the statute. Rev. Code, 1831, p. 321. It recites a cause of action within the jurisdiction of the justice, and bears upon its face legal authority for the constable to act under it. He was not bound to look beyond it and inquire whether it was preceded by an affidavit or not. Its precept was obligatory upon him, and must constitute his defense, provided his duty has been discharged. Had the action for false imprisonment been against the justice himself, or the plaintiff in the process had been sued, the rule would have been different. They could not justify without showing an affidavit as well as a writ; and, probably, the latter would be bound to show a cause of action.

[*331] *The objection that the return of the writ is not set forth, is fatal to the plea. When an officer justifies under process, which he is bound to return—the return-day being past—he must allege his return in his plea. To make a return is as much his duty, as obedience to any other mandate in the writ. Without it his justification is not complete, and he is a trespasser *ab initio*. A distinction has been taken between *mesne* and *final* process, the first being considered as returnable, the other not. Whether this distinction as to the returnable character of these two kinds of process, exists under our statute, it is not necessary now to decide. The *capias ad respondendum* relied upon, on the present occasion, is returnable process, and the plea is bad for not averring its return. *Hoe's Case*, 5 Co., 90; *Freeman v. Blewett*, 1 Ld. Raym., 632.

Grimes and Another v. Wilson and Wife.

Willes, 33 and *n*; *Middleton v. Price*, 2 Str., 1184; *Rowland v. Veale*, Cowp., 18; *Cheasley v. Barnes*, 10 East, 73; *Shorland v. Govett*, 5 B. & C., 485. We are aware that this point was differently decided by this Court, in the case of *Patterson v. Kise*, 2 Blackf., 127. On a review of the authorities, we have become satisfied it is our duty to revise that decision, so far as the point in question is concerned.

There is a defect in the plea in the case before us, not adverted to in the demurrer. It is this, the introductory part of the plea is confined to the first count; but in the body and conclusion, an attempt is made to embrace the whole declaration.

Per Curiam.—The judgment is reversed with costs. Cause remanded, with leave to the defendant to amend his special plea, &c.

R. A. Lockwood, for the plaintiff.

A. S. White, for the defendant.

GRIMES and Another v. WILSON and Wife.

DOWER.—The term *messuage*, as used in the statute regulating dower, may include a few acres of land adjacent to a dwelling-house, but not a whole farm.

SAME.—If a widow enter upon the lands of her deceased husband, other than “the mansion-house and messuage thereunto belonging,” and appropriate the *proceeds to her own use, she is a wrong-doer, and amenable to the proprietor of the land for the rents and profits.(a)

ACCOUNTS—RENTS AND PROFITS.—To entitle a party to the aid of a Court of chancery to compel an account of rents and profits, he must connect with his cause of complaint some peculiar equitable ground for the interference of the Court, such as fraud, &c.(b)

INFANT, RIGHT OF.—An infant has a right to consider any person as his guardian, bailiff, or trustee, who enters upon his land and receives the proceeds, and may compel him to account for the same in a Court of chancery.(c)

(a) *Williamson v. Ash*, 7 Ind., 495.

(b) *Egbert v. Thomas*, 1 Ind., 393.

(c) *Breeding v. Shinn*, 8 Ind., 125.

Grimes and Another v. Wilson and Wife.

CHANCERY—PRACTICE.—Two persons joined in a bill in chancery, each having a separate claim against the defendant. One of the complainants, on account of his infancy, had a right to sue in chancery, but the other had no such right. *Held*, on demurrer, that the bill was insufficient. *Held*, also, that on sustaining the demurrer in such case, the bill should not be dismissed as to the infant, but should stand over in order that he might strike the name of the other complainant from the bill.

APPEAL from the *Shelby* Circuit Court.

DEWEY, J.—*Wilson Grimes*, an infant, by his next friend and guardian, and *Charles Grimes*, filed a bill in chancery against *Allen Wilson* and *Henrietta*, his wife.

The bill states that *Noble Grimes*, the father of the complainants, died intestate, seized and possessed of “all that messuage or mansion-house, land, tenements, and hereditaments known” as two certain half-quarter sections of land (describing them), leaving the complainants and seven other children (naming them), his next of kin and heirs at law, to whom the premises descended, subject to the right of dower of his widow *Henrietta Grimes*; that after the death of *Noble Grimes*, two of his heirs deceased, leaving the complainants and his other surviving children their next of kin and heirs at law, to whom descended their respective estates in the premises described in the bill; that on those premises there were, at the time of the death of *Noble Grimes*, forty acres of cleared land fit for cultivation; that the widow of *Noble Grimes*, one of the defendants, upon the decease of her husband, entered upon the premises, cultivated the cleared ground, and received the rents and profits thereof to her own use until her intermarriage with *Wilson*, the other defendant; that since that event, to the filing of the bill, *Wilson* had been in the receipt of the rents and profits; that in addition to the proceeds of the cleared land, the defendants had received profit from wood-land, a sugar-camp, and an orchard on the premises; that the complainants were each entitled to a share of the rents and profits so received by the defendants; and that they had [*333] demanded an account and payment of the *same, which had been refused. The prayer of the bill is

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for an account of the rents and profits, and payment to the complainants of their respective shares, which are alleged in the bill to amount to upwards of \$130 each.

General demurrer to the bill for want of equity; demurrer sustained, and bill dismissed.

In support of the demurrer, it is contended that the bill does not present a case showing a right in either of the complainants to hold the defendants responsible in any manner; but that if such right does exist, the remedy is at law and not in equity.

The first position is based upon the construction given by the defendants to our statute regulating dower.

That act, after providing that the widow of an intestate shall be endowed of one full and equal third part of the real estate, whereof her husband was seized during coverture, provides "that until such dower shall be assigned, it shall be lawful for her to remain and continue in the mansion-house and messuage thereunto belonging, without being chargeable to pay **the heir any rent** for the same."(1) The defendants conceive, that the terms mansion-house and *messuage thereunto belonging*, embrace not only the dwelling-house and a small parcel of land connected with it, but that they include the whole farm or plantation in possession of the husband at the time of his death; and that, therefore, as the bill does not allege the assignment of dower to the widow of *Noble Grimes*, she and her present husband, *Wilson*, are not accountable to the complainants as heirs at law, either in law or equity, for the use and occupation of any part of the premises described in the bill.

We can not concur in giving to the phrase in question a meaning so extensive. It is difficult to define with precision the signification of the legal term *messuage*. Authors have differed in their understanding of its import. The best writers, however, represent it as synonymous with house, and as embracing within its meaning an orchard, garden, curtilage, adjoining buildings, and other appendages of a dwelling-house; but they limit the ground which may be appropriated

to these purposes to a small quantity, not exceeding an "acre or more." 1 Thom. Coke, 215, 216, and notes; 1 Shep. Touch., 94; 2 Saund., 401, n. 2. Our statute, by using the words mansion-house and messuage, can not be supposed to have designed to *give to the latter term a meaning entirely new and inconsistent with its usual sense; and though the act may have somewhat enlarged its import so as to include a few acres of land (greater or less in extent according to circumstances), adjacent to a dwelling-house, and appropriated peculiarly to its use, it can not be construed so as to make that term embrace a whole farm or plantation. The bill would have been better drawn, had it stated what part of the real property described in it is a messuage, and what, other land. Enough, however, is alleged to show, that the defendants entered upon a greater portion of the land than was warranted by the statute.

This statute leaves the right of dower of the widow of an intestate, as it stood at common law, excepting that it is extended to equitable as well as legal titles, and that the privilege of remaining in the possession of the mansion-house and messuage thereunto belonging, rent free, until assignment of dower, is substituted in the place of her right to occupy the chief mansion of her husband forty days after his decease—which is called her quarantine.(2) By the common law, "the widow can not enter for her dower until it be assigned her, nor can she alien it so as to enable the grantee to sue for it in his own name. She has no estate in the lands until assignment; and after the expiration of her quarantine, the heir may put her out of possession, and drive her to her suit for her dower. She has no right to tarry in her husband's house beyond the forty days; and it is not until her dower has been duly assigned, that the widow acquires a vested estate for life, which will enable her to sustain her ejectment." She is not, in consequence of her right of dower, a tenant in common with the heir at law or devisee. 4 Kent's Comm., 61, 62; 1 Thom. Coke, 584; *Doe v. Nutt*, 2 Carr. & Payne, 430; *Chapman v. Armistead*, 4 Munf., 382; *Jackson v. O'Donaghy*, 7 Johns. R.,

247; *Sheafe v. O'Neil*, 9 Mass. Rep., 13; *Moore v. Gilliam*, 5 Munf., 346. The necessary consequence of this view of the subject is, that if a widow enter upon the lands of her deceased husband, other than the "mansion-house and mesuage thereunto belonging," and appropriate the proceeds thereof to her own use, she is a wrong-doer, and answerable to the proprietor of the lands for the rents and profits.

The next inquiry is, whether the remedy for such an injury is at law or in equity?

*335] *In order to entitle a party to the aid of a Court of Chancery to compel an account for rents and profits, it is necessary that he should show something more than a mere right to them, and that they have been withheld from him. He must connect with his cause of complaint "some peculiar equitable ground for interference, such as fraud, or accident, or mistake, the want of a discovery, some impediment at law, the existence of a constructive trust, or the necessity of interposing to prevent a multiplicity of suits." 1 Story's Eq., 487; 1 Madd. Ch., 74; 1 Fonb. Eq., b. 1, ch. 3, sec. 3; *Dormer v. Fortescue*, 2 Atk., 282; 3 Atk., 124 to 134. The bill of complaint in the record presents none of these features. It merely states that the widow and her husband, *Wilson*, entered upon the lands which descended to the complainants, and for a number of years enjoyed, exclusively, the rents and profits thereof. So far, no equitable jurisdiction is shown over the cause of either of the plaintiffs.

There is, however, one feature in the bill which entitles one of the complainants, *Wilson Grimes*, to a hearing in chancery; and that is his infancy. An infant has a right to consider any person who may enter upon his land and receive the proceeds thereof, as his guardian, bailiff, or trustee, and compel him to account for them in a Court of equity. 1 Story's Eq., 487; 1 Madd. Ch., 74; 1 Atk., 544; *Newburgh v. Vickerstaffe*, 1 Vern., 295; *Cary v. Bertie*, 2 Id., 342; *Hutton v. Simpson*, 2 Id., 722; 3 Atk., 129, 130.

It remains to inquire, what is the consequence of conjoining in a bill one plaintiff who is entitled to sue in a Court of

equity, with another who has no such right? Independently of the objection to such a practice, arising from the great inconvenience which would attend it, this point rests on authority. In the cases of the *King of Spain and others v. Machado and others*, 4 Russ. Rep., 225, and *Cuff v. Platell*, Ibid, 242, it was held that the conjunction of a plaintiff having an interest in the subject of the suit, with another without such interest, was fatal on general demurrer for want of equity. The same principle was recognized in *Makepeace v. Haythorne*, 4 Russ. Rep., 244, in which the objection to the misjoinder was taken by plea. It is true that in the case at bar, both the complainants show an interest in the rents and profits received by the defendants, but their rights [*336] are perfectly distinct; they have no connection *with each other. The one, in consequence of the privilege of infancy alone, has a right to seek redress in equity; the other, without such privilege, exhibits a distinct cause of action of pure common law cognizance, and shows no impediment to his remedy at law.

There is no privity between these plaintiffs. Were they connected in interest, one holding the legal and the other the equitable interest, as is the case with assignor and assignee, principal and agent, and in other cases of like character, they might join. In such instances but one claim is sought to be enforced by parties claiming one under the other. Here two independent demands, the one a proper subject of equitable, the other of legal jurisdiction, are attempted to be coerced conjointly. We think the principle governing the decision of the cases, in which one plaintiff had an interest in the subject-matter of the controversy and the other had none, is applicable to this case; and that, therefore, the demurrer was well allowed by the Circuit Court.

But in consideration of the infancy of *Wilson Grimes*, the bill should not have been dismissed as to him. The cause should have been ordered to stand over, that he might strike the name of *Charles Grimes* from the bill, and proceed alone.

Grimes and Another v. Wilson and Wife.

Per Curiam.—The decree is reversed. Cause remanded, &c. *P. Sweetser* and *S. Major*, for the appellants.
C. Fletcher, *O. Butler* and *H. Brown*, for the appellees.

(1) Rev. Code, 1831, p. 209; Accord. Rev. Stat., 1838, p. 239.

(2) The widow has now a right of dower in the *equitable* estate to which her husband was entitled *at the time of his death*; and the husband is, for this purpose, considered equitably entitled to any real property for which he had contracted, in proportion to the purchase-money which he had actually paid. Rev. Stat., 1838, p. 238, 239.

END OF MAY TERM, 1837.

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA

AT INDIANAPOLIS, NOVEMBER TERM, 1837, IN THE TWENTY-
SECOND YEAR OF THE STATE.

HARNEY, an Infant, &c., v. OWEN.

APPRENTICE—STATUTORY LAW.—An indenture of apprenticeship executed by a minor is not binding on him at common law; nor is it binding on him under the statute of this State, unless sanctioned by a parent or guardian.

MINOR—RESCISSION OF CONTRACT.—If a minor, on the ground of his infancy, rescind a contract which had been fairly executed, and which was apparently to his advantage, he can not afterwards sue for the money or property advanced, or labor performed, by him under such contract.(a)

ERROR to the *Rush* Circuit Court.

DEWEY, J.—Assumpsit for work and labor. The cause was tried by the Circuit Court upon an agreed case. Judgment for the defendant.

The facts are these. The plaintiff and defendant entered into a contract under seal, by which the plaintiff bound

(a) This case is overruled by *Garner v. Bourd.* 27 Ind., 323; 5 Id., 142; 6 Id., 363; 3 Id., 537.

Harney, an Infant, &c., v. Owen.

himself as an apprentice to the defendant, and agreed to serve him until full age. The defendant covenanted to board, clothe, and instruct, &c., the plaintiff, and at the end of his term of service to give him property to the amount of sixty dollars.

At the time of making the contract the plaintiff [*338] was, and still is, a *minor, without either parent or guardian; he served the defendant under the contract eight and a half months, and then left his service without his knowledge or consent, and commenced this suit for his labor. The services rendered by him were worth fifty dollars, and he received thirty-one dollars in necessities of the defendant while he lived with him.

We have no difficulty in deciding, that articles of apprenticeship entered into by a minor are not binding upon him at common law; and it is equally clear, that the contract in this case is not obligatory upon the plaintiff under the statute of this State, for the want of the sanction of a parent or guardian. It is such a contract as the minor had a right to disaffirm at his pleasure. This right has been exercised by his abandonment of the service of his master, and by commencing this action for his work. But whether, having thus rescinded the contract, he is entitled to recover for services rendered under it, upon an implied assumpsit, is a question with regard to which the decisions of Courts have not been uniform. We believe the sounder principle, and the preponderance of authority to be, that, when a minor enters into a contract, apparently to his advantage, and which has been obtained from him fairly, without any attempt to mislead his judgment, or to impose upon his inexperience, and he chooses to rescind it after having received in part, or in full, the consideration stipulated by the contract, he does not thereby acquire the right of sustaining an action for what he may have advanced under it, whether such advance be in labor, property, or money; and that to suffer him to do so, would be enabling him to practice upon others that fraud and imposition, against which his privilege of infancy was designed to protect himself; that it would be placing in his hands "a sword and not a shield."

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Badger v. Phinney, 15 Mass., 359; 2 Kent's Comm., 240, 2d Ed.; *Holmes v. Blogg*, 8 Taunt., 508; *M'Coy v. Huffman*, 8 Cowen, 84; *Weeks v. Leighton*, 5 New Hamp., 343; *Stone v. Dennison*, 13 Pick., 1.

The contract in the record was evidently advantageous to the minor. It provided for his necessities whether he should be able to labor or not, and guarded his morals by securing to him instruction in a useful occupation. That the services rendered by him happened to exceed in value, the article with which he had been furnished at the time he saw fit to [*339] disaffirm *the contract, did not change its beneficial character. And there is no pretence that it was procured by undue means.

Per Curiam.—The judgment is affirmed. The costs to be paid by the *prochein amy*. To be certified, &c.

J. Perry, for the plaintiff.

O. H. Smith for the defendant.

 DEIBLER and Others v. BARWICK, Administrator.

VENDORS' LEIN.—The vendor of real estate retains an equitable lien on the property for the purchase-money (unless he voluntarily divest himself of it), against the vendee, and subsequent purchasers with notice.

FRAUD.—An agent for the sale of certain real estate sold the same to *N.*, and fraudulently took a note in his own name for the purchase-money. The payee assigned the note to *S.*, and the assignee sued the maker. The maker pleaded infancy and thus defeated the suit. The administrator of *S.* filed a bill in chancery against the original owner of the estate, the agent, and the maker of the note, stating the above facts, averring the insolvency of the assignor, and praying a sale of the estate to satisfy the note. *Held*, that there was no equity in the bill.

ERROR to the *Franklin Circuit Court*.

DEWEY, J.—*Barwick*, administrator of the estate of *Swiggett*, exhibited his bill in chancery against *B. S. Noble, G. L. Deibler, M. Deibler and M. E. Deibler*. He states that *M.* and *M. E. Deibler* were seized in fee of certain lots of land; that

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they appointed, by letters properly executed, *G. L. Deibler* their attorney in fact, with authority to sell and convey the same; that, in pursuance of his power, he did sell them to *Noble* by deed duly executed in the name of his principals, and recorded, for the sum of \$185, for which he fraudulently took *Noble's* notes payable to himself individually; that one of these notes, which was for sixty-five dollars, he assigned by indorsement in his own name to *Swiggett*, who purchased it as being for a part of the purchase-money for the lots. The bill further states, that at the maturity of the note so purchased, *Swiggett* commenced suit upon it against *Noble* before a justice of the peace; that *Noble* appeared to the action, pleaded infancy in bar, sustained his plea, and obtained judgment in his favour; that he has always refused to pay the [*340] money, *and that complainant has no means of enforcing payment from him; that the money could not, at any period after the failure of the suit against *Noble*, be recovered of *G. L. Deibler* in consequence of his notorious insolvency, and absence from the State; and that all and each of the defendants refuse to pay the note. The prayer of the bill is, that the lots of land, or a part of them, be sold to satisfy the note assigned to *Swiggett*.

Noble answered. He admits the bill to be true; states that he was an infant when he bought the property, and that immediately upon attaining full age he "surrendered his purchase;" that when sued on the note he avoided payment by the defense of infancy, and disclaims all interest in the suit. The bill was taken as confessed against the other defendants. The Court decreed, on final hearing, that there was due to the complainant a certain sum, being the amount of principle and interest of the note, and that *G. L. Deibler*, *M. Deibler* and *M. E. Deibler* pay the same with costs of suit, into the clerk's office within thirty days, or that in default thereof, the lots of land or a part of them be sold for the satisfaction of the debt and costs. A commissioner was appointed to carry the decree into effect.

We know of no principle upon which this decree can be

sustained. It is true, that the vendor of real estate sold on a credit retains an equitable lien on the property for the purchase-money (unless he voluntarily divest himself of it), against his vendee and all subsequent purchasers with notice. But it is difficult to conceive how this principle can benefit the plaintiff in error under the facts stated in the bill. Admitting that the extinguishment, by the defense of infancy, of the debt against *Noble* due by the note which *Swiggett* purchased of *G. L. Deibler*, did not in any degree affect the lien which the real vendors held on the land for the purchase-money; and admitting also, that the assignment of a debt which is an equitable lien upon land, passes the lien as well as the debt to the assignee (points with regard to which we give no opinion), still there is no pretence for saying that *Swiggett* acquired such a lien by his purchase of the note, under the circumstances of this case. The bill alleges that the attorney had power to sell and convey the land, but does not claim that he was authorized to take notes for the purchase-money in his own name, and then to assign them. The debt and lien consequent upon the sale belonged to the vendors, *M. and M. E.*

[*341] **Diebler*. The unauthorized and, as the bill charges, fraudulent acts of the agent in taking the notes in his own name, and afterwards selling one of them without the authority or sanction of his principals, could not divest them of any right whatever. They could, at any time before the assignment to *Swiggett*, have compelled *G. L. Deibler* to assign the note to them; and it is probable that it is in their power yet, should they choose to do so, to compel the complainant to do the same, as he admits that *Swiggett* purchased it with knowledge of the fraud in the manner of taking the note, and that he participated in the further fraud by the unauthorized sale of it.

But however this may be, the only right which *Swiggett* could acquire by the purchase of the note was, in the first instance, the legal remedy against *Noble* by suit on it, and on failure of that, either through the invalidity of the note, or the insolvency of the maker, a recourse upon his assignor, *G.*

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L. Deibler. There is not the slightest pretence that any privity of contract between the intestate and *M. and M. E. Deibler* existed; that they have expressly, or impliedly, rendered themselves liable to him or his representative in any manner whatever; or that they conveyed or authorized to be conveyed to him their lien upon the land as the vendors. If by the expression in his answer, that he had "surrendered his purchase," *Noble* meant that he had reconveyed the land to them, they have but got their own. If it has not been reconveyed, and any remedy for the purchase-money yet exists against it, that remedy is theirs.

Per Curiam.—The decree is reversed with costs. Cause remanded, with directions to the Circuit Court to dismiss the bill, &c.

J. Ryman, for the plaintiffs.

G. H. Dunn, for the defendant.

CUNNINGHAM v. GWINN.

VENDOR AND PURCHASER—CONCURRENT ACTS.—Although a note given in part payment of certain real estate, be due before the time appointed for the execution of the deed, yet, if suit on the note be not commenced until after the time when the deed was to be executed, the
 [*342] *defendant may plead in bar that the plaintiff did not, on the day fixed by the contract for the purpose, execute or offer to execute the deed.(a)

SAME.—If a title-bond be executed in such case, bearing the same date with the note, they constitute one contract, and the note is subject to the same defense as if it showed, on its face, the consideration for which it was given.(b)

APPEAL from the *Morgan* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit, commenced in *September*, 1836, by *Gwinn*, assignee of *Giles*

(a) *Holman v. Lamme*, 6 Blackf., 222; *Myers v. Cicott*, 5 Id., 225

(b) See cases cited in *Mix v. Ellsworth*, 5 Ind., 517.

Cunningham v. Gwinn.

Mitchell, against *Cunningham*, upon a written promise, dated the 30th of *May*, 1835. The writing is for the delivery of 3,000 gallons of whisky, at the promiser's distillery, to *Giles Mitchell* or order, on or before the first of *March* next after the date. This writing was assigned to *Gwinn*, the plaintiff below. The defendant pleaded non-assumpsit, and several pleas in bar. Issues to the country were joined on all the pleas but the last two, which are the fifth and sixth.

The fifth plea states, that on the 30th of *May*, 1835, the assignor of the plaintiff sold the defendant two certain tracts of land, and gave him a title-bond for the same; that the condition of the bond is, that the assignor of the plaintiff should make, or cause to be made, to the defendant a good deed in fee-simple for the land, as soon as the defendant should pay for it agreeably to the obligations for the amount, given by him to the assignor of the plaintiff, of the same date with the bond; and also that the assignor of the plaintiff should, in the meantime, keep the defendant in possession of the premises, and of the distillery thereon. The plea then avers, that the writing mentioned in the declaration was given in consideration of the land thus purchased; that the assignor of the plaintiff had not then, nor has he yet, a good title to the land, nor has he conveyed the same, or caused it to be conveyed to the defendant, nor has he or any other person offered to convey it.

The sixth plea is, in substance, the same with the fifth.

To these pleas the plaintiff, after obtaining *oyer* of the title-bond and condition, replied as follows: That before the time of the promise declared on, the title to the land was in *James Mitchell*; that he verbally authorized the assignor of the plaintiff to sell the same to the defendant, which was accordingly done, the defendant knowing the title to be in *James Mitchell*; that the title-bond was executed by the assignor of the plaintiff, in his own name, at the defendant's request, [343] and the *writing in question taken in part payment, with another note for one thousand gallons of whisky, payable on the first of *June* then next following;

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that *James Mitchell* has since ratified the contract, and has always, since the purchase, had a good title to the land, and is able and willing to convey it to the defendant, and the plaintiff is able and willing to cause him so to convey it, as soon as the note sued on, and the other note mentioned in this replication, are satisfied; of which the defendant had notice.

There was a demurrer to this replication, and judgment for the plaintiff. The issues of fact were submitted to the Court, and the plaintiff obtained a judgment.

The objection which the defendant makes to the replication is, that it does not state that the assignor of the plaintiff had ever made or caused to be made a good title for the land to the defendant, or offered to do so. The plaintiff, in answer to this objection, says, that two notes were given in payment of the land, one of which was not due until long after the note sued on was payable; and that, therefore, as the deed was not to be executed until the purchase-money was paid, the note sued on is an independent promise. It appears to us, that the defendant's objection is not well answered. The note sued on was due on the first of *March*, 1836, and the other note was due on the first of *June* then next following. The suit was not commenced until *September*, 1836. If the plaintiff had brought his suit on the note first due, before the time fixed for the execution of the deed, he might have recovered without a previous execution of the deed or an offer to execute it. *Leonard v. Bates*, *May* term, 1822. But he did not do so. He thought proper to wait until after the time when the title was to be made agreeably to the contract, before he sued on the note which was previously due. It was then too late for him to treat that note as an independent contract.

We consider that the fifth and sixth pleas are valid. They state the note sued on to have been given in consideration of the land, and that, on payment of it, the deed was to be made. They then aver that no deed was made or offered to be made. This defense is sufficient according to the case of *Leonard v. Bates*, and the authorities there cited. If the assignor of the plaintiff failed, on the day, to perform or offer to perform his

Reagan and Others v. Maze.

part of the contract, and could show no legal excuse [*344] for the *failure, the purchase-money can not and ought not to be recovered. *Bank of Columbia v. Hagner*, 1 Peter's Rep., 455. It is not necessary to the validity of the defense in this cause, that the note should, on its face, show the consideration for which it was given. The title-bond and the notes for the payment are of the same date and make one contract. *Hunt v. Livermore*, 5 Pick. Rep., 395.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the sixth plea set aside, with costs. Cause remanded, &c.

C. P. Hester, for the appellant.

P. Sweetser, for the appellee.

REAGAN and Others v. MAZE.

PROMISSORY NOTE—PLEADING.—*Held*, that a promissory note dated at Union county, State of Indiana, might be declared on in another county, without noticing the words *State of Indiana*.

SAME.—*Held*, also, that the declaration in such case need not state the place at which the note is dated. (a)

APPEAL from the *Fayette* Circuit Court.

BLACKFORD, J.—*Maze* brought an action of debt against *Reagan* and others on a promissory note. The declaration commences as follows: State of *Indiana*, *Fayette* Circuit Court, March term, 1837, to-wit: *David Maze*, complains, &c. For that, whereas heretofore, to-wit, on the 9th of *November*, 1836, at Union county, to-wit, at the county of *Fayette* aforesaid, the said *Joseph Reagan*, *Absalom Sutton* and *Meredith Helm*, by the style, name and description of *M. Helm*, made their certain promissory note in writing, &c. The note, which was read on oyer, commences in these words: "*Union county*,

(a) *Anderson v. Hamilton*, 6 Blackf., 94.

State of Indiana, November 9th, 1836, on or before," &c. And it is signed, "*Joseph Reagan, Absalom Sutton and M. Helm.*"

The defendants demurred to the declaration, on the ground of a variance between the note described in the declaration and the one read on *oyer*; and the Court gave judgment, on the demurrer, in favour of the plaintiff.

[*345] *The first variance alleged is, that the declaration, in stating the place where the note was executed, omits the words *State of Indiana*, which are in the note. The variance here pointed out is not material. It is not necessary, in an action on a promissory note dated at a particular place, to state the place of its date in the declaration. This point is expressly decided in *Houriet v. Morris*, 3 Campb. Rep., 303.

The defendant relies on the *English* practice in the case of specialties. And it is no doubt true, that, until the recent rule in pleading of 4 Will., 4, the *English* practice in actions on specialties was, to state the place of the date in the declaration, whenever such place was shown by the bond. *Mostyn v. Fabrigas*, Cowp. Rep., 177. That practice, however, let the reason for it be what it may, was confined to declarations on specialties; and it is now changed in *England* even as to them. There is not at present, in *England*, according to the new rule of pleading to which we have referred, any venue whatever inserted in the body of the declaration in any cause, except where, as in trespass *quare clausum fregit*, a local description is required. 3 Chitt. Gen. Pr., 470.

The other alleged variance relates to the signatures of the defendants to the note. The declaration might have been more explicit on this subject, but still there is no ground in this part of the case for a demurrer.

Per Curiam.—The judgment is affirmed with 5 *per cent* damages and costs. To be certified, &c.

S. W. Parker, for the appellants.

C. B. Smith, for the appellee.

The State v. Davis.

THE STATE v. DAVIS.

NOLLE PROSEQUI—AFTER TRIAL COMMENCED.—*Quære*, whether the prosecuting attorney has a right to enter a *nolle prosequi* in a criminal cause after the trial has commenced? and if he has, what is the effect of such an entry upon another indictment for the same offense?

SAME.—The refusal, if wrong, to admit a *nolle prosequi* in such case, is no ground for a writ of error, after a verdict and judgment for the defendant.(a)

[*346] ***ONCE IN JEOPARDY.**—Although the Court may have improperly prevented the State from entering a *nolle prosequi*, or have misdirected the jury, or have admitted illegal or rejected legal evidence; or the verdict be against evidence; the verdict and judgment of *acquittal* on an indictment, if fairly obtained, are conclusive; and the defendant can not be again put in jeopardy for the same offense.

ERROR to the *White* Circuit Court.

DEWEY, J.—This was an indictment for obtaining money by false pretences. Verdict of acquittal, and judgment in discharge of the defendant.

It appears by a bill of exceptions, that, after the testimony on both sides had been closed, and the defendant heard in his defense, the prosecuting attorney moved the Court for leave to enter a *nolle prosequi*. The motion was overruled, and the trial progressed.

It is contended by the State, that the prosecuting attorney had the right to enter a *nolle prosequi* notwithstanding evidence had been heard in the cause, and that to refuse him the exercise of that right was an error in the Circuit Court, which must reverse its judgment.

Whether to enter a *nolle prosequi* after the trial of a criminal cause has commenced be a right of the State? and if so, what would be the effect of such an entry upon another indictment for the same offense? are questions with regard to which we have not been able to find any satisfactory adjudication. But, however this matter may be, there is no difficulty in pro-

(a) See cases cited in *Joy v. The State*, 14 Ind., 139; *State v. Daily*, 6 Id., 9; 8 Blackf., 533; 6 Id., 155.

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nouncing, that although the State may have been improperly refused by the Court leave to enter a *nolle prosequi*, or the Court have misdirected the jury, or illegal evidence may have been admitted, or legal testimony rejected, or the verdict be against evidence, the verdict and judgment of acquittal on an indictment, if fairly obtained, are conclusive; and that neither by the principles of the common law, nor by the provisions of our constitution, can a defendant again be put in jeopardy for the same offense. 2 Salk., 646; 1 Wils., 298; 1 Lord Raym., 63; 4 Black. Comm., 361; 2 Hawk. P. C. ch., 47, s. 11; 4 M. & S., 337; 17 Mass., 534.(2)

Per Curiam.—The judgment is affirmed. To be certified, &c.

W. Quarles, for the State.

A. S. White and R. A. Lockwood, for the defendant.

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*ANTHONY v. GILBERT.

TRESPASS—MEASURE OF DAMAGES.—In trespass for taking away a yoke of oxen the jury, in estimating the damages actually sustained by the plaintiff, ought not to add to the value of the oxen any amount for their services.

SAME.—If the trespass have been committed with malice, insult, or deliberate oppression, the jury may join exemplary damages to the pecuniary loss.

SAME—EVIDENCE.—Under a plea, in such suit, of property in a third person, evidence of such ownership, at the time of the taking, is admissible.

SAME—EVIDENCE IN MITIGATION.—The defendant may show in mitigation of damages, under the general issue in this suit, that the goods, at the time of the taking, belonged to a third person, and that the plaintiff was not liable for them to the owner.

SAME—EVIDENCE IN BAR.—And *semble*, that, under such issue, evidence in bar of the suit may be adduced, showing that a third person owned the property, and that the defendant acted under his authority.

APPEAL from the *Delaware* Circuit Court.

DEWEY, J.—Trespass for taking and carrying away a yoke of draught-oxen. There is also a count of *quare clausum fregit*, from which no point arises. Pleas, general issue;

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property of the oxen in one *Probus*; property in one *Green*. Verdict and judgment for the plaintiff.

On the trial, after proving the trespass by taking and carrying away the oxen, and establishing their value, the plaintiff was permitted, against the objection of the defendant, to prove the value of the services of the cattle from the time of the taking to the institution of the suit. The Court instructed the jury that the value of the oxen, and the value of their services from the time of committing the trespass to the commencement of the action, should be the measure of damages. The defendant excepted to the admission of the testimony, and to the giving of the instruction.

But one question arises from these two decisions of the Court. Was the plaintiff, in addition to the value of the oxen, entitled to the value of their services from the time of taking up to the commencement of the suit?

[*349] * We know of no standard, by which damages in actions of trespass can at all times be measured. The nature of the injury complained of renders it impracticable to establish such a rule. The first inquiry should be, the amount of injury actually sustained: which, together with interest, is a good general measure of damages, in the absence of circumstances of aggravation. But to limit the investigation to the pecuniary loss of a plaintiff would frequently do him injustice, and always to extend it beyond such loss, would as often be unjust to the defendant.

The assessment of damages is a matter which must be, unavoidably, in a great measure left to the discretion of the jury. It is proper for them to take into consideration all the circumstances under which a trespass may have been committed; and wherever malice, insult, or deliberate oppression, has been an ingredient in the wrongful act, to award, in addition to the actual loss sustained, such exemplary damages as shall tend to prevent a repetition of the injury. *Bracegirdle v. Orford*, 2 M. & S., 77; *Merest v. Harvey*, 5 Taunt., 442; *Sears v. Lyons*, 2 Stark., 317; *Woert v. Jenkins*, 14 Johns., 352; *Churchill v. Watson*, 5 Day's Rep., 140. This species

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of damages, which is sometimes called "smart money," is distinct from special or consequential damages. And neither of them was contemplated by the evidence, or the instruction to the jury, in this case; the design of which was to ascertain the amount of actual injury sustained by the plaintiff. We think a wrong rule of admeasurement was applied for the accomplishment of that object. The value of working oxen consists, in part, of the value of the services which they are capable of performing. Therefore, the charge to the jury, that to the price or worth of the cattle, they should add the value of their subsequent services, was directing them to make, in some degree, a double assessment of damages against the defendant, for the pecuniary loss of the plaintiff. The jury might, with propriety, have been instructed, that if, in their opinion, the trespass was marked with any of the features of aggravation above stated, they were at liberty to join exemplary damages to the pecuniary loss.

The Court erred in admitting evidence of the value of the services of the cattle, as a distinct matter from the value of *the oxen themselves; and in instructing the jury to assess damages accordingly.

An attempt has been made to present another point in this case. We are informed by the bill of exceptions, that the defendant offered to prove the rendition of a judgment in favour of the plaintiff against one *Probus*, the issuing an execution upon it, and a sale of the oxen in dispute, under the execution, to some person other than the plaintiff, and that the Court rejected the testimony. But we do not learn whether the defendant offered to make his proof by parol evidence, or by the production of the papers. If the former was attempted, the testimony was correctly rejected; if the latter, we have no means of judging of the correctness of the decision, because the documents are not spread upon the record.

As, however, the legality of the same testimony may again be a question in the future progress of the cause, it may be desirable to settle the matter now. Under the special pleas, it is competent for the defendant to prove that the oxen belonged,

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at the time of taking, to either of the persons named in the pleas. Under the general issue, it is his right to show to the jury, in mitigation of damages, that the property in the oxen, at the time of the taking, was in a third person, and that the taking was under such circumstances as not to render the plaintiff liable to such third person for the value of the cattle. 9 Pick. Rep., 551. And it may be added that, probably, under that issue, evidence in defense or bar of the action may be adduced, that the property taken belonged to a third person, and that the defendant acted under authority derived from him.(1)

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

J. Rariden and J. S. Newman, for the appellant.

D. Kilgore and M. M. Ray, for the appellee.

(1) In trespass for seizing goods in the possession and apparent ownership of the plaintiff, the defendant can not set up the title of a *third person* to defeat the action. *Nelson v. Cherrill*, 1 M. & Scott, 452; 7 Bingh., 663; *Demick v. Chapman*, 11 Johns. 132; *Cook v. Howard*, 13 Id., 276; *Hanmer v. Wilsey*, 17 Wend., 91; *Squire v. Hollenbeck*, 9 Pick., 551; *Walpole v. Smith*, ante, 304.

 [*351] *NUTTER v. THE TRUSTEES OF SCHOOL DISTRICT, &c.

CHANGE OF SCHOOL DISTRICT BOUNDARY.—If the boundary of a school district be changed conformably to a legal petition, the consequent change of the boundary of the adjoining district is valid without a petition.

ERROR to the Union Circuit Court.

BLACKFORD, J.—This was an action of debt commenced before a justice of the peace. It was brought in the name of "The trustees of school district number four, in congressional township number twelve, range two west," against *Benjamin Nutter*. The object of the suit, as is shown by the statement of the cause of action, was to recover the sum of \$10.93, as a

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tax assessed in that district against the defendant. The only plea is the general issue. Judgment by the justice for the plaintiffs. The defendant appealed to the Circuit Court. Judgment by the Circuit Court, without a jury, for the plaintiffs.

The principal subject of inquiry to which our attention has been called in this cause is, whether the district number four was legally established? We shall decide this question without stopping to inquire whether the defendant has, strictly, a right to raise it in this action or not. The following are the facts relative to this part of the cause:

The township trustees, in the first place, divided the township into nine districts. Some of the districts, of which number eight was one, elected their officers. Afterwards, all the districts except number eight, which is the one in which the defendant resided, petitioned for a new division of the township. The township trustees, accordingly, made a new division of the township, and reduced the number of districts to five. The old district number eight had two miles attached to it on the north, and was designated as number four. Trustees for this district number four were appointed, under the statute of 1833, by the clerk of the township trustees.

The defendant contends that district number eight, in which he resides, and which is now included within district number four, has been changed without authority, and that therefore the tax assessed against him by district number four is illegal.

This objection to the tax is not well founded. The [*352] statute *authorizes the township trustees, on petition of a majority of the voters of any district, to alter such district in its size or limits as convenience may require. Stat. 1833, p. 94. Such a change made in any one district, necessarily produces an alteration in the boundaries of one or more of the districts adjoining it; and thus it is evident that districts may be materially altered in their extent without any petitions from their inhabitants. It is in this way that the northern boundary of the old district number eight has been legally changed without any petition of its voters. The alteration made with regard to the other districts, for which there

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were the necessary petitions, has occasioned the enlargement of district number eight, the designation of it as number four, and its reorganization. It appears to us that the township trustees were warranted by the statute and the petitions before them, in making the change in the districts, and in number eight among the rest, which they have made.

The evidence respecting the organization of district number four, the assessment of the tax against the defendant, and the demand on him for the same, is set out in the record, and is sufficient, so far as proof of those facts are concerned, to authorize the judgment in favor of the plaintiffs.

The question whether the plaintiffs are a corporation, does not arise in this cause. Their capacity to sue in the name they have assumed, is admitted by the plea of the general issue. *Guaga Iron Company v. Dawson*, in this Court, November term, 1836.(1)

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

J. Perry, for the plaintiff.

C. H. Test, for the defendants.

(1) *Ante*, 202. In *New York*, the law on the subject is now as follows. "In suits brought by a corporation created by or under any statute of this State, it shall not be necessary to prove, on the trial of the cause, the existence of such corporation, unless the defendant shall have pleaded in abatement or in bar, that the plaintiffs are not a corporation." 2 Rev. Stat. N. Y., p. 458.

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*STANLEY v. NORRIS.

FRAUD—WARRANTY.—A suit against the vendor of goods founded on *fraud* in the sale, is not sustained by proof of a *warranty* and breach without *fraud*.(a)

APPEAL from the *Fayette* Circuit Court.

BLACKFORD, J.—An action on the case in *tort* was brought by *Norris* against *Stanley* before a justice of the peace.

(a) *Jones v. Quick*, 28 Ind., 125; *Zehner v. Kepler*, 16 Id., 290; *Gatling v. Newall*, 9 Id., 572; 1 Id., 176; 2 Id., 457; 8 Id., 516.

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The following statement of the cause of action was filed:

State of *Indiana*, *Fayette* county, *Jackson* township. Before *C. Thompson*, justice. *Samuel S. Norris* complains of *Samuel Stanley* of a plea of trespass on the case. For that whereas, heretofore, to-wit: on the 15th of *November*, 1836, at the township aforesaid, the defendant was possessed of a certain horse which he well knew to have extremely weak and defective eyes, so much so as to render him nearly if not entirely good for nothing; yet the defendant, for the purpose of inducing the plaintiff to buy the said horse, deceitfully, falsely, and fraudulently, affirmed to the plaintiff that the horse was a good and sound horse. And thereupon the plaintiff, confiding in the said affirmation, bought the horse of the defendant for the sum of ninety dollars, paid him the price, and received from him the horse. The plaintiff avers, that from the time of the purchase up to the time of bringing this suit, the eyes of the horse have grown worse and worse so as to destroy the sale of him, and almost entirely unfit him for any use or service whatever. And so the defendant falsely and fraudulently deceived the plaintiff, to the plaintiff's damage fifty dollars, and hence he sues.

The cause was tried before a justice, and the plaintiff recovered a judgment for one cent damages and costs. The plaintiff appealed to the Circuit Court, and obtained there a verdict and judgment for forty-two dollars.

The defendant, on the trial, asked the Court to instruct the jury, that the plaintiff, to recover in this suit, must prove that the defendant *knew* at the time of making the alleged affirmation of soundness, that the horse was unsound in the eyes as alleged. The Court refused this instruction, but they informed the jury, that the action was founded on a warranty of the soundness of the horse; and that if the plaintiff had [354] proved a *warranty* of soundness, and also the unsoundness of the horse, he could recover without proving that the defendant *knew* that the horse was unsound.

The Circuit Court, in refusing the instruction asked for by the defendant, and in giving the other instruction, has

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considered that the affirmation set out in the declaration, is, of itself, a warranty of soundness. In this, the Court has mistaken the law. It is not necessary now to examine this point. The question was decided by us at the last term in the case of *House v. Fort*.

The action now before us is not founded, as the Court supposes, upon a warranty that the horse was sound. The *gravamen* of the suit is the fraud of the defendant in falsely representing the horse to be sound, when he *knew* him to be unsound. It is the defendant's knowledge of the falsity of the representation, upon which the plaintiff in his declaration depends; and, without proof of that knowledge, this action can not be sustained. The proof of a warranty and its breach does not sustain the declaration; the reason is, that a warranty is not described as the cause of action, and the *probata* must agree with the *allegata*. This doctrine is expressly stated in *Thompson v. Ashton*, 14 Johns. Rep., 316. In that case it is said, that, when the action against the vendor is founded on the *fraud* and not on the *warranty*, evidence of a warranty without fraud will not support the action. That language of the Court in *New York* directly opposes the instruction to the jury in the present cause. The plaintiff here refers us, for a contrary opinion, to the case of *Williamson v. Allison*, 2 East, 446. That was an action on the case in *tort* for a breach of warranty, and not only a warranty but the *scienter* was alleged in the declaration. The Court there correctly decided that proof of the warranty was sufficient; and the reason of that decision is, that the warranty and not the *scienter* was considered to be the *gist* of the suit. But the case which we are now to determine is of a different character. Here there is no warranty laid, and the *scienter* is described as the foundation of the action. The consequence is, that the *scienter* must be proved, or the plaintiff must fail. The Court erred in giving the instruction of which the defendant complains. They erred, also, in refusing to give the instruction which was asked for by the defendant.

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[*355] **Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.
G. Holland, and *C. B. Smith*, for the appellant.
C. H. Test *S. W. Parker*, for the appellee.

THE STATE v. OFFUTT.

PERJURY.—Perjury may be committed in giving evidence before a grand jury.

SAME—INDICTMENT.—An indictment for perjury must state a day certain on which the offense was committed.

ERROR to the *Rush* Circuit Court.

DEWEY, J.—This was an indictment for perjury, charged to have been committed in giving evidence before a grand jury, legally impaneled in the *Rush* Circuit Court. The prisoner moved the Court to quash the indictment; the motion was sustained, and the prisoner discharged. The reason assigned in support of the motion, and alleged by the Court as the ground of quashing the indictment, was, that the “law does not warrant an indictment for perjury founded on a swearing before a grand jury.”

There is not the slightest foundation for this proposition. By our statute, every person, who, having taken a lawful oath or affirmation in a judicial proceeding, or other matter in which the law requires an oath, shall swear or affirm falsely, willfully, and corruptly, touching any material matter, or who shall thus swear or affirm before any officer authorized to administer an oath, to any certificate, or affidavit or statement of any nature whatever, or for any purpose whatever, shall be deemed guilty of perjury. That these provisions extend to false evidence before a grand jury, admits not of the least doubt.

The Circuit Court, however, committed no error in quashing the indictment. It is vicious for want of a day certain

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being laid on which the committing of the perjury is charged. The charge is, that the offense was committed before the grand jury impaneled, &c., at a Circuit Court begun and [*356] held *on, &c. This is not sufficient; a particular day should be named.

Per Curiam.—The judgment is affirmed. To be certified. &c.
W. Quarles, for the State.

C. B. Smith and *C. H. Test*, for the defendant.

CUMMINS v. WHITE and Another.

EQUITY—JURISDICTION IN MATTERS OF ACCOUNT.—The jurisdiction of Courts of equity, in matters of account, has been gradually enlarged, until it has become concurrent with that of common law Courts, to an almost unlimited extent, over the mutual dealings of parties, even when those dealings consist of items of a purely legal character.

SAME.—Courts of equity, however, have no jurisdiction over accounts where there is but one item on a side, or where there is no mutuality of dealing and a discovery is not required.

SAME.—In matters of account which are mutual and complicated, or where a discovery is required, or a multiplicity of suits will be avoided, or the remedy at law is not full and adequate, or fraud, accident, or mistake, is connected with the subject, Courts of equity have jurisdiction; but where none of these characteristics exist, the mutual dealings of the parties result in causes of action, matters of set-off, &c., cognizable only at law.

SAME.—Courts of equity sometimes protect a creditor against the effects of the insolvency of his debtor, where there are mutual credits and the law furnishes no adequate remedy, by decreeing a set-off.

SAME.—A defendant in a suit at law, who confesses judgment, reserving equity, &c., has no right to proceed in chancery for his demand against the plaintiff, which he would not have had without such reservation.

SAME.—An objection that the Court, whether of law or equity, has no jurisdiction over the subject-matter in controversy, may be made at any stage of the suit.

VOLUNTARY PAYMENT.—If a party, with full knowledge of the facts, voluntarily pay an unjust debt which is attempted to be enforced against him by legal proceedings, he can not afterwards recover it back either at law or in equity; *a fortiori*, if a debt thus paid had been previously in part paid, the first payment can not be recovered back.

Cummins v. White and Another.

FRAUD—MISTAKE.—If a note upon which the maker has confessed judgment, was obtained by fraud or mistake, he may obtain relief in a Court of chancery.

APPEAL from the *Jefferson* Circuit Court.

DEWEY, J.—*Cummins* by his bill in chancery states, that in 1816 he was indebted to *Jacob White* in the sum of \$633, for which he executed his promissory note payable [*357] in *1820. On the fifth of *November*, 1823, he sold and conveyed to *White* a quarter section of land at the price of \$400. This sum was to be credited on the note, which not being at hand at the time, *White* gave *Cummins* his receipt for the deed of conveyance, acknowledging that he was to credit the \$400 on the note. In 1823 or 1824, *Cummins* sold to *White* a wagon and harness at seventy-five dollars, which sum was also to be credited on the note. In 1824, the note was assigned by *Jacob White* to *Israel White*, and soon afterwards was credited with forty dollars, the price of a horse. In 1827, a settlement of mutual accounts took place between *Cummins* and *Jacob White*, in which the former was found to be indebted to the latter in the sum of \$112.10, for which he executed his note. The settlement did not include the price of the land or of the wagon and harness, *Cummins* "supposing and believing" they had been credited on the note for \$633. In 1829, *Israel White* informed *Cummins* that both the notes had been assigned to him, and demanded payment.

In the same year *Israel White*, as assignee, commenced a suit on both notes, when *Cummins*, "greatly to his surprise," discovered that no credit for the price of the land, or the wagon and harness, had been entered upon the larger and older note. In *August*, 1830, *Cummins* fully satisfied the latter note by conveying to *Israel White* 230 acres of land at the price of \$1,096.87, that being the amount due—"the attorney of *Israel White* refusing to allow on said note" any credit for the quarter section of land and the wagon and harness. At the *March* term, 1833, of the *Jefferson* Circuit Court, *Cummins* confessed judgment upon the note for \$112.10

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“reserving all defense in equity as fully as if defense had been made at law.” The transfer of the notes by *Jacob White* to *Israel White* was without consideration, and made with a design to defraud creditors. *Jacob White*, at the time of filing the bill, was, and for a long time before had been insolvent. He was justly indebted to *Cummins* in the sum of \$475, the aggregate of the prices of the quarter section of land and the wagon and harness the same never having been applied to the payment of the note for \$633, or otherwise accounted for. *Cummins* could not, as he believed, collect any part of the sum due him, of *Jacob White*, on [*358] *account of his insolvency. *Israel White* threatened to sue out execution on the judgment confessed.

The prayer of the bill is, that until final hearing execution be stayed; that on final hearing the judgment be perpetually enjoined; and that the excess due from *Jacob White* to *Cummins* be decreed to be paid.

The Circuit Court granted an injunction.

Israel White, by his answer, denies all knowledge of the settlement of book accounts mentioned in the bill, admits the assignment of the notes to him, and controverts all fraud in that transaction. He admits the commencement of suit on the notes, and that by a compromise between him and *Cummins*, he received a conveyance of 230 acres of land in discharge of the note for \$633. He asserts that the nominal price of the land was \$1,096.87, the amount due on the note, and alleges that the price was fixed without regard to the real value of the land. He admits the recovery of judgment on the note for \$112.10 as charged in the bill, and repeats that he is the *bona fide* owner of it.

Jacob White also answered. He denies the alleged fraud in assigning the notes to *Israel White*, and that the seventy-five dollars for the wagon and harness, the purchase of which he admits, was to have been credited on the note, and asserts the wagon and harness were included in the settlement of 1827 mentioned in the bill. He admits the purchase of the quarter section of land at \$400, the receipt for the deed, and the

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agreement that the price of the land should be credited on the note as charged in the bill, but states his belief that this matter was adjusted in the settlement of accounts made in 1827, and claims that the receipt should have been given up to him; and he denies that he is, in any manner, indebted to *Cummins*. His answer contains affirmative matter, which is omitted in this statement, as it is entirely unsupported by the evidence in the cause.

Cummins replied generally. On final hearing, the only proof (except the exhibits) was, that the \$400 for the quarter section of land, and seventy-five dollars for the wagon and harness, were not, nor was either of them, included in the settlement of 1827, and the insolvency of *Jacob White*. [*359] The *Circuit Court dissolved the injunction and dismissed the bill. *Cummins* appeals.

The appellant, assuming that in matters of account and fraud, courts of law and equity have concurrent jurisdiction, and that in the present case he had a right to avail himself of either tribunal, contends that the decree of the Circuit Court is erroneous; 1st, because the bill discloses matter of account; and, 2d, because fraud and mistake are alleged in the bill, and established by the proof. That the two Courts possess concurrent jurisdiction over these subjects can not be denied; and it is equally true, that where there is a concurrency of jurisdiction over the cause of a suitor, he has a right to elect that to which he will resort for redress.

At a very early stage of *English* jurisprudence, Courts of Chancery began to take cognizance of matters of account, in consequence of the inadequacy of the remedy at law by the old action of account, and the great delay and expense of that mode of procedure; and have gradually enlarged the jurisdiction thus assumed, until it has become concurrent with that of the common law courts, to an almost unlimited extent, over the mutual dealings of parties, even when those dealings consist of items of a purely legal character. 1 Story's Eq., 424.

There is, however, a distinction in the power of the two tribunals with regard to this subject. It is certain that over

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multifarious and complicated mutual dealings, a Court of equity has jurisdiction, and that it has none over accounts consisting of but one item on a side; while the power of the law Court embraces both extremes. So, equity has no jurisdiction over accounts, however numerous and important the charges, where there is no mutuality of dealing, and discovery is not required; but law has.

At what point between single mutual items, and dealings swelled to great complexity, the right of a Court of equity to take cognizance of the matter begins or ends, has not been denoted with certainty, and, from the nature of the subject, can never be very clearly defined. As we recede from the two extremes and approach the line of commencing or terminating jurisdiction, much must necessarily be left to the discretion of the chancellor; he must decide each case upon its own peculiar features. It may, however, be safely stated, that

in matters of account which are mutual and complicated, or *where a discovery is required, or a multiplicity of suits will be avoided, or the remedy at law is not full and adequate, or fraud, accident, or mistake is connected with the subject, equity has jurisdiction; on the contrary, where none of these characteristics are present, the mutual dealings of parties result in causes of action or matters of set-off, or other defense, cognizable only at law. Jer. Eq., 504; 1 Story's Eq., 428, 441; *Dinwiddie v. Bailey*, 6 Ves., 136; *Corp. of Car. v. Wilson*, 13 Ves., 279; *Smith v. Marks*, 2 Rand. Rep., 449; 2 Johns. Ch. R., 169; 1 Dana's Rep., 584; 1 Madd. Ch. Pr., 70, 71; *Moses v. Lewis*, 12 Price, 502.

The case last cited is in point. It was "a bill for an account of dealings and transactions between the parties in respect of a colliery rented by the plaintiff of the defendant, and of the quantity of coals got and raised therein by plaintiff, and rent paid by the latter from time to time; and of certain promissory notes drawn, made and indorsed by the plaintiff for defendant's use; and praying further that" a certain sum "(for which the defendant had obtained a verdict in an action at law brought by him against the plaintiff as mentioned in

the bill), might be set off against what should be found to be due and owing to the plaintiff on taking the account between them, and that the defendant might be compelled to pay the balance to the plaintiff." An injunction was also prayed. Demurrer to the bill.

Graham, B., with the concurrence of the whole Court, said, "I am of opinion that this demurrer should be allowed; for I can not but think, that if the bill to which it has been put in could be sustained against it, the affairs of men in business might be thrown into inextricable confusion by such suits under similar circumstances. We are asked by the bill to interfere, by granting an injunction to restrain a party who has obtained a verdict at law in an action brought against the plaintiff in this suit, of a very common and ordinary nature, and which has been tried in the regular course at *nisi prius*. . . . I think it (the bill) does not establish a case of account on its own statement, as it merely states what might have been pleaded at law as matter of set-off, or might be made the subject of defense at law in some other way. . . . The plaintiff has come too late to seek the object of his suit. If we were to entertain bills of this sort in this stage of [*361] the *proceedings at law, judgments would be of no avail wherever there was anything in the course of dealing between the plaintiff and defendant that could be called an account between the parties, or which, by dint of ingenuity in the framing of a bill of this sort, might be made to carry the appearance of an account. . . . By encouraging such a bill in this late stage of the action, we should invite defendants to have recourse to this mode of delaying plaintiffs on every occasion of judgment recovered; and it would be an example very frequently followed, to the great embarrassment and hinderance of justice."

It is evident that the bill before us, if tested by the decision of the case of *Moses v. Lewis*, and the reasoning of the Court, which we have so liberally quoted, as well as by the general principles previously stated, can not be sustained on the score of its containing matter of account. Indeed, it does not

appear to have been framed with a view that it should be so sustained. It does not claim that a series of mutual dealings require adjustment; nor does it pray an account. It is doubtful whether it even makes out an indebtedness by *Jacob White* to the plaintiff; but allowing such to be the fact, it merely states that there are two specific items amounting to \$475 on the part of the plaintiff, with regard to the proof of which no difficulty is suggested, and which it is prayed may be in part set off against the judgment in favour of *Israel White*, and that *Jacob White* may be decreed to pay the excess to the plaintiff. The bill does not exhibit, nor attempt to exhibit, a single feature of equity jurisdiction in matters of account; its object evidently is set-off in part, and the recovery of the residue of a specific sum claimed by the plaintiff. This object can not be accomplished by this suit. It is probable, that had the bill been well founded on matter of account, and had it been exhibited while the action at law was undecided, the plaintiff would have been entitled to have proceedings stayed until an account could be taken, and finally to a perpetual injunction had the balance been found to be in his favour. *Moses v. Lewis, supra.*

It is true that equity sometimes protects a creditor against the effects of the insolvency of his debtor, when there are mutual credits between them and the law furnishes no adequate remedy, by decreeing a set-off. But this principle can not avail the plaintiff in this case; the insolvency of [*362] *Jacob *White* (granting his indebtedness) could have done him no harm, had he made the defense at law which was in his power.

The plaintiff supposes he is entitled to a hearing in chancery, in consequence of the reservation contained in the judgment confessed. In this we apprehend he is mistaken; he could not reserve a right which he did not possess; he had no privilege to forego his set-off in the action at law, and transfer his claim to a Court of equity; nor could the consent of both parties give him such a right. The jurisdiction of Courts is not conferred in that manner.

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It is urged that the objection to the jurisdiction of the Court, for want of equitable matter in the bill, comes too late on final hearing—that the question should have been raised by demurrer. We are aware that respectable decisions can be found in favour of this position. But we think the weight of authority and principle is adverse to it. We understand that the want of jurisdiction over the subject-matter of a controversy, in a Court of law or equity, is fatal at any stage of a suit, and decided accordingly in the case of *Bryan v. Blythe*, at the *November* term, 1836, of this Court. There are certainly some objections to a bill which would prevail on demurrer, that will not avail on final hearing—such as a want of proper parties, or multifariousness. But this is not the case with objections which strike at the vitals of a cause by showing want of equity, or jurisdiction, over the subject-matter (if there be any distinction between them), apparent upon the face of the pleadings. Mitf. Pl., 108; 2 Rand., 449.

We have, so far, considered *Jacob White* indebted to the plaintiff for the quarter section of land and the wagon and harness, which the bill states were to have been applied in part extinguishment of the note for \$633, but which were not so applied. In the character of a debt, we have seen that the price of these things formed a proper matter of set-off at law, with regard to which equity gives no relief. If we view the transactions as amounting to part payment or satisfaction of the note, the whole of which, principal and interest, the plaintiff afterwards knowingly satisfied by the transfer of 230 acres of land, the result will be the same. It is a well settled principal, that if a party, with full knowledge of the

facts, voluntarily pays an unjust debt which is
[*363] attempted to be *enforced against him by legal proceedings, he can not afterward, recover it back by action at law, although at the time of payment he protested against it. Chitt. on Cont., 190; *Brown v. M'Kinally*, 1 Esp. R., 279; *Knibbs v. Hall*, Id., 84; *Marriott v. Hampton*, 2 Id., 546; *Cartwright v. Rowley*, Id., 723; *Brisbane v. Dacres*, 5 Taunt. 144. This doctrine has been sanctioned as a sound

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general principle in equity by Lord *Eldon*, in the case of *Bromley v. Holland*, 7 Ves., 23. If a party can not recover back a payment thus wittingly made, but rendered unjust in consequence of a prior extinguishment of the debt, there is still less reason for claiming that he can regain the first payment which was justly made.

It only remains to consider the position of the plaintiff, that the note for \$112.10, on which he confessed judgment, was obtained through fraud and mistake. If the note was obtained by means of either, the case comes within the concurrent jurisdiction of equity, and without the aid of the reservation contained in the judgment, the plaintiff is still entitled to relief.

But it is a sufficient answer to this objection to the decree of the Circuit Court, that neither fraud nor mistake is charged in the bill in procuring the note in question. It is, indeed, alleged that in making the settlement of accounts in 1827, between the plaintiff and *Jacob White*, the former did not exhibit his claim for the quarter section of land and wagon and harness, amounting to \$475, because he supposed it had been credited on the note for \$633. How could his mistaken supposition in this matter invalidate the note for \$112.10, which was given on that occasion? It is not pretended that the balance was not correctly struck, nor does either party request to have the settlement opened. From the plaintiff's own showing, the claim omitted should not have been included in the settlement; it was payment on the note; and the neglect of *Jacob White* to indorse the credit, could not affect its efficacy. The indorsement would only have been evidence of the fact of payment, and that evidence was not necessary to the security of the rights of the plaintiff, for he states that he then held a receipt for \$400, the price of the land, and he suggests no difficulty in proving the seventy-five dollars for the wagon and harness. It is thus evident from the plaintiff's own statements, that he had it in his power to

[*364] *enforce the application of these payments to the note for \$633, at any period from 1823, when he

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says they were made to 1830, when he voluntarily, with full knowledge of all the facts, satisfied the whole without regard to former transactions.

These facts, so far from showing that any fraud was practiced upon the plaintiff in the settlement of accounts, or that he acted under such a mistake of facts as can invalidate the note given on that occasion, rather account for that indifference to the matter which induced him to rest quietly under the supposition of a fact, without so much as an inquiry as to its existence; indeed, they tend to implicate the truth of his statement which assigns the reason of his conduct. On the other hand, there are circumstances of suspicion which attach themselves to *Jacob White*. He claims in his answer that certainly the wagon and harness, and he believes the quarter section of land, were included in the settlement of 1827. The evidence shows the truth to be otherwise.

On the whole, were there no obstacles to the success of the plaintiff arising from legal principles, the facts of the case are involved in too much doubt and suspicion to authorize a Court of equity to interfere with a judgment at law.

SULLIVAN, J., having been concerned as counsel, was absent.

Per Curiam.—The decree is affirmed with costs. To be certified, &c.

S. C. Stevens, for the appellant.

LAW v. HATCHER.

STATUTE OF FRAUDS—VERBAL SALE.—No verbal sale of goods for the price of thirty dollars or upwards is valid under the statute, unless the buyer accept and actually receive part of the goods, or give something in earnest to bind the bargain or in part payment.^(a)

ACTION AGAINST CARRIER—PROPERTY IN PLAINTIFF.—To sustain a suit against a carrier for an injury to the goods carried, the goods must belong to the plaintiff at the time of the injury.

^(a)See 1 R. S. (G. & H.), p. 351

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INDORSEMENT OF BILL OF LADING.—The property of goods described in a bill of lading, is, by the owner's indorsement of the bill, vested in the indorsee.

ERROR to the *Tippecanoe* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit by [*365] *Hatcher* *against *Law*, before a justice of the peace.

The following is the statement of the cause of action: “Mr. *John Law* to *Archibald Hatcher*, Dr., June 29, 1836. To damage on thirty clocks, thirty-seven dollars.” The defendant pleaded the general issue. The justice gave judgment for the plaintiff. The defendant appealed to the Circuit Court, and the cause was there tried upon the merits, without a jury. The following was the evidence before the Circuit Court:

Runyan & Pharis purchased, in the State of *Connecticut*, a quantity of clocks with cases, and ordered the same to be sent to them at *Lafayette*, in the State of *Indiana*, by the way of *Chicago*. The clocks were accordingly sent to *Chicago*, and the forwarding merchant there delivered them to the defendant to be taken by him in a wagon to *Runyan & Pharis*, or their assigns, at *Lafayette*, they paying freight. The defendant signed bills of lading and delivered them to the forwarding merchant at *Chicago*. Whilst the clocks were on their way from *Chicago* to *Lafayette*, they were sold at *Lafayette*, by *Runyan & Pharis*, to the plaintiff. By the contract of sale, the plaintiff was to pay *Runyan & Pharis* the *Connecticut* prices for the clocks, and also to pay the expenses of carriage. The defendant having arrived with his wagon at *Lafayette*, informed the consignees, *Runyan & Pharis*, that he had brought the clocks for them from *Chicago*. They informed the defendant that the clocks belonged to the plaintiff, to whom they must be delivered. The defendant, accordingly, delivered the clocks to the plaintiff, in his warehouse at *Lafayette*, and received from him the charges for carriage. The boxes containing the clocks were opened on the next day after their receipt by the plaintiff, when the clocks and cases were discovered to have sustained an injury by water, to the amount of thirty-seven dollars.

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Upon this testimony, the Circuit Court gave judgment for the plaintiff.

This is an action of assumpsit which the plaintiff, who had bought certain goods from the consignees and owners, has brought against a carrier by land for an injury to the goods whilst they were in the carrier's possession. There is on the threshold of the cause a fatal objection to the plaintiff's recovery. The record does not contain any satisfactory evidence to show that, at the time the clocks received the [*366] injury *complained of, they were the property of the plaintiff. According to the statute of frauds, no verbal sale of goods for the price of thirty dollars or upwards, is valid, unless the buyer accept and actually receive part of the goods, or give something in earnest to bind the bargain or in part of payment. Rev. C., 1831, p. 274.(1) The sale in question was to an amount above thirty dollars, and, for anything that appears by the record, it was made by parol, without any payment whatever, and without a delivery of any part of the goods. Under these circumstances, it is impossible for us to say that any change of property in the clocks took place until the defendant actually delivered them, at *Lafayette*, to the plaintiff. Previously to that time they must be considered as the property of *Runyan & Pharis*; and it is to them alone that the defendant is responsible for any injury to the clocks, which they may have received on the way from *Chicago* to *Lafayette*.

The plaintiff's remedy, if he have any, for the defective state of the clocks when he received them, is against *Runyan & Pharis*; and their remedy, if they have any, for the injury in question is against the carrier who had charge of the clocks at the time they received the injury.

If the bill of lading, by which the defendant was bound to deliver the goods to the consignees or their assigns, had been indorsed to the plaintiff at the time of his contract with *Runyan & Pharis*, the property would then, by virtue of the indorsement, have vested in the plaintiff. Abbott on Shipp., 308. In that case, the plaintiff might have sued the carrier

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for any injury to the goods for which he was liable, provided the injury took place subsequent to the indorsement. There does not appear, however, to have been any such indorsement of the bill of lading, nor, indeed, any other written evidence of the sale.

We are of opinion that the judgment of the Circuit Court against the defendant is not sustained by the evidence, and that he is consequently entitled to a new trial.

Per Curiam.—The judgment is reversed with costs. Cause remanded for another trial.

A. S. White and R. A. Lockwood, for the plaintiff.

J. Pettit, for the defendant.

(1) The mere circumstance that the article sold is not to be delivered until a future period, does not take the case out of the statute. *Rondeau* [*367] v. *Wyatt*, 2 *H. Bl., 63; *Cooper v. Elston*, 7 T. R., 14; *Jackson v. Covert*, 5 Wend., 139. *Aliter*, where the article is to be manufactured, or labour performed on it to prepare it for delivery. *Ibid.* *Bennett v. Hull*, 10 Johns., 364; *Crookshank v. Burrell*, 18 Id., 58; *Sewall v. Fitch*, 8 Cowen, 215.

VANKIRK v. TALBOT.

CONTRACT—MUTUAL COVENANTS, FAILURE TO PERFORM.—Where, in an agreement between two parties, there are covenants to be performed by each at the same time and place, the party who sues must aver that he has performed or offered to perform his part, or show a legal excuse for his not doing so.

ERROR to the *Putnam* Circuit Court.

BLACKFORD, J.—This was an action of covenant against *Talbot* for not delivering, agreeably to his contract, a certain number of hogs to *Vankirk*.

The declaration states that the defendant had bound himself by an agreement under seal, to deliver to the plaintiff 600 head of hogs of a certain description; that the hogs were to be delivered at the defendant's own house in *Putnam* county,

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and at the house of some person in the neighborhood of *George Piercy's* in the same county, between the first and fifth days of *November*, 1835; and that the plaintiff did, at the same time, bind himself to pay to the defendant two dollars and fifty cents a hundred for the hogs, to be paid for on delivery at the pen. It is then averred that, at the time of the agreement, the plaintiff paid to the defendant \$100 in part performance of the agreement; and that he has at all times been ready and willing to perform his agreement according to the true intent and meaning thereof. The breach assigned is, that the defendant has failed and refused to keep and perform his covenant in this, viz: that he did not, at his own house in *Putnam* county, nor did he at the house of any person in the neighborhood of *George Piercy's* in said county, between the first and fifth of *November*, 1835, deliver to the plaintiff the hogs mentioned in the agreement, nor has he at any time delivered them to the plaintiff as he was bound to do; but the defendant, although often requested, has hitherto wholly refused to perform his covenant.

[*368] *The defendant demurred specially to the declaration and assigned as a cause of demurrer, that the plaintiff does not allege a readiness to pay the price of the hogs at the time and place of delivery. The Circuit Court gave judgment on the demurrer for the defendant.

In this case, there were covenants to be performed by each party at the same time and at the same places; and to enable one of them to sue the other for a breach of the contract, the party who sues must show that he has performed or offered to perform his part, or that there is some legal excuse for his not doing so.

The contract alleged in this declaration is very imperfectly expressed. The following may be considered its legal construction. It was agreed that *Talbot*, on the last convenient hour of the fourth of *November*, 1835, or, if he should so appoint, on the last convenient hour of the second or third of that month, would deliver to *Vankirk* 600 hogs. The hogs were to be delivered at the defendant's own house, and at the

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house of some other person in *Piercy's* neighborhood—such part of them at the one place, and such part at the other, as *Talbot* might choose. The house in *Piercy's* neighborhood was to be designated by *Talbot*, and notice thereof was to be given by him to *Vankirk*. The price of the hogs, except the \$100 advanced, was to be paid to *Talbot* upon the delivery of the hogs at the pen.

It was for *Vankirk*, in declaring upon this contract, to show that he had performed or offered to perform his part of it; or, if he had been prevented from doing so by the default of *Talbot*, that default should have been set out in the declaration. It would have been a sufficient excuse for the want of an averment, in this case, of the plaintiff's performance of his part of the contract, if the declaration had stated that the defendant did not inform the plaintiff at what house in *Piercy's* neighborhood a part of the hogs would be delivered; or how many of them would be there delivered, and how many at the defendant's own house; that the plaintiff, therefore, was not ready, as he otherwise would have been, at the proper time and places to receive and pay for the hogs; and that the defendant had not delivered the hogs as he was bound to do.

The declaration, however, contains no averment of facts, showing that the plaintiff had performed or offered
[*369] to perform *his part of the contract, nor does it show any legal cause for the omission of such an averment.

It is consequently bad on general demurrer.(1)

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

C. Fletcher and *O. Butler*, for the plaintiff.

T. A. Howard and *J. Cowgill*, for the defendant.

(1)1. Where the plaintiff's covenant constitutes a condition precedent, to enable him to maintain an action against the defendant for the non-performance of his part of the agreement, he must have previously performed his part or have done that which is equivalent to a performance, or he can not claim the right which was to attach on its being executed. And the fulfilment of such condition precedent must be averred, whether the duty be to be executed by the plaintiff or by any other person: or some excuse for the non-performance must be shown; for where all proper steps are taken by a party

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to observe the condition, and the neglect or default of the other party renders the performance impossible, or where he dispenses with such performance, (performance being in the power of the party offering), the tender is tantamount to a performance, and the plaintiff acquires the right as completely as if the previous deed had actually been done. But performance or its equivalent must be alleged and proved, to support the suit; and, therefore, the defendant may plead non-performance of the condition precedent in bar of the action; or, if the averment as to performance be entirely omitted, or imperfectly made, the defendant may demur to the declaration.

2. If the acts contracted for be to be performed at the same time, neither can maintain an action without showing a performance of, or an offer to perform, or at least a readiness to perform, his part, though it be not certain which of the parties is obliged to do the first act.

3. If the covenants be mutual and independent, as it is no excuse for the defendant to allege a breach of the contract on the part of the plaintiff, so without performance on the plaintiff's part, he is capable of supporting an action, and of course no averment of performance is necessary to be inserted in the declaration. Platt on Cov., 104. 1 Selw. N. P., 6th Am. ed., 504 to 518.

HARRIS v. DOE, on the Demise of BARNETT and Another.

SEPARATION OF JURY—DISCHARGE OF.—After a trial in a civil suit had commenced, the jury were permitted, by consent of parties, to disperse until the next day. One of the jurors failing to appear on the next day, the jury were discharged and another immediately impaneled. *Held*, that this proceeding was not erroneous.(a)

INDIAN TREATY—EVIDENCE.—A treaty with the Indians, so far as respects the grants of land to individuals contained in it, is evidence of the grantees' title, and, as such, proper to be laid before a jury.

[*370] *WITNESS—PRESUMPTION AS TO.—An Indian is not a competent witness under the statute of the State; but the Supreme Court can not presume that a witness, admitted as competent in the Circuit Court, was an Indian, merely because he was the principal chief of an Indian nation.

EVIDENCE—CERTIFIED COPIES FROM LAND OFFICE.—The seal of the general land office, and the signature of the commissioner thereof, to copies of papers required by law to be deposited in that office, *prima facie* prove themselves.(b)

(a) *Ashbaugh v. Edgecomb*, 13 Ind., 466.
(b) *Smith v. Mosier*, 5 Blackf., 51.

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PAROL EVIDENCE TO EXPLAIN DEED.—If from the expressions in a grant, &c., respecting real estate, it is doubtful to what object it refers, or it is evident that a mistake in the description of the boundaries has been committed, or if the boundaries be insufficiently described in it, extrinsic evidence, even parol, is admissible to explain the instrument.(c)

LOST INSTRUMENT.—The oath of one of several plaintiffs to the loss of an instrument of writing, is sufficient to let in secondary evidence of its contents.

CONSTRUCTION OF TREATIES.—The construction of treaties, deeds, &c., belongs to the Court as a matter of law.(d)

SPECIAL ACT OF CONGRESS—EVIDENCE.—A special act of Congress respecting a grant of real estate to an individual under an Indian treaty, can have no efficacy, if passed subsequently to the grantee's death, in confirming his title; but the act may be evidence for a jury, in explanation of the treaty, relative to the situation of the land.

VERDICT—ERRONEOUS INSTRUCTION.—A verdict in accordance with the weight of the testimony and with justice, ought not to be set aside on account of an erroneous instruction given by the Court to the jury.(e)

APPEAL from the *Allen* Circuit Court.

DEWEY, J.—This was an action of ejectment on the several demises of *Barnett* and *Hanna* against *S. Harris*, *E. B. Harris*, and *M. Harris*, for a tract of land described in the declaration as situate in the county of *Allen*, and as being “the south-east or upper section of two sections of land, on the west side of *St. Mary's* river, of a survey made by the surveyor general of the public lands of the *United States*, prior to the seventh day of *May*, 1823, for *Francis Lafontaine* and son, under a treaty made by *Jonathan Jennings*, *Lewis Cass*, and *Benjamin Parke*, commissioners on the part of the *United States*, and the *Miami* nation of Indians of the other part, entered into on the sixth of *October*, 1818.” Verdict against *S. Harris*, and in favour of *E. B. Harris* and *M. Harris*. Judgment accordingly. *S. Harris* prosecutes this writ of error.

Various points are presented upon the record by bills of exceptions.

1. A jury was impaneled, who, having heard a part of the

(c) *Saunders v. Heaton*, 12 Ind., 22.

(d) *The Richmond &c., Co. v. Farquar*, 8 Blackf., 89.

(e) 4 Ind., 154; *Jolly v. The Terre Haute &c., Co.*, 9 Ind., 421.

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testimony, was, by consent of parties suffered to disperse during an adjournment of the Court over night. On the next morning one of the jurors failed to appear; whereupon the

Court discharged the jury, and caused another to be [*371] *immediately impaneled, and the trial to proceed.

The impanneling of the second jury and trying the cause at the term which the Court was then holding, is objected to as erroneous.

There was no error in this proceeding. It was a matter of course that the second jury should be impaneled and the trial proceed without delay, unless some cause, other than the discharge of the first jury, had been shown to the contrary. If the second panel was illegal it should have been challenged. If either party was rendered unready to proceed in consequence of what had happened, he should have presented his affidavit pointing out the difficulty. Otherwise there was no ground for a continuance of the cause to another term.

2. The lessors of the plaintiff were suffered to give in evidence to the jury the treaty between the *United States* and the *Miami* Indians, made the 6th of *October*, 1818, at *St. Mary's*, the same mentioned in the declaration.

This treaty contains a grant of two sections of land to *Francis Lafontaine* and son, so ambiguously expressed as to leave it doubtful on which side of the *St. Mary's* river the land is situate. The defendants objected to its admission on the grounds that, as being a public law of the land, it was not a subject-matter of evidence for the jury, and that as the land described in the declaration lies on the west side of the *St. Mary's*, and one clause of the treaty refers to the land granted to *Lafontaine* and son, as being on the east side, there was a variance which should have excluded the testimony. This treaty under the constitution of the *United States* is, undoubtedly, obligatory upon our Courts as public law; but it also partakes of the character of a contract. It contains several grants to individuals besides that to *Lafontaine* and son, and is partially descriptive of the boundaries of the premises granted. In this view it is the evidence of the title of the grantees, and

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embraces testimony in reference to matters of fact involving private interest proper to be laid before a jury, subject, however, like other written instruments, to the right of the Court to pronounce its legal effect. So far as these individual grants are concerned, this treaty is like a private act of legislation, of which courts do not officially take notice, but which must be specially pleaded or proved, like other matters of fact affecting property and private rights. The variance suggested does not exist, as will be seen when we shall attend to the [*372] *construction of the treaty. We are of opinion that this evidence was properly admitted.

3. *Richardville* was permitted to give evidence as a witness, the objection of the defendants to his admissibility being overruled. The ground on which this objection is attempted to be sustained is, that *Richardville* was an Indian, and, therefore, not competent as a witness under the statute of this State. The objection would be valid were it founded on fact. But we are not informed by the record that the witness was an Indian. The bill of exceptions and the treaty of *St. Mary's* gave him the description of "principal chief of the *Miami* nation of Indians." This, at most, could be considered only as presumptive evidence of the fact assumed, and is rebutted by the fact of his being admitted to testify by the Court below, which acted on the inspection of the judges. It is not new in the history of the Indian tribes, that a white man should be their chief.

4. The lessors of the plaintiff offered in evidence a copy of a plat and description, made by the surveyor general; of "sundry Indian reserves on the *St. Mary's* river, granted to individuals, among which are the two sections granted to *Lafontaine* and son, located on the west side of the river. This document is authenticated by the certificate of the commissioner of the general land office, under his seal of office, stating it to be "a true copy of the plat and description of the reservation of two sections for *Francis Lafontaine* and son, in connection with the reservation of *Joseph Beaubien*, and for the son of *G. Hunt*, under the *St. Mary's* treaty of the 6th of

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October, 1818, as returned to this office by the surveyor general." The signature and official character of the commissioner were proved; but no evidence was offered that the seal was that of the general land office. The defendants objected to the admission of the testimony, but the Court overruled the objection, and the copy thus authenticated was given in evidence.

The only fault found with this decision is, that the seal affixed to the copy was not proved to be that of the general land office. We do not think that this objection is well taken. By the act of Congress of the 25th of April, 1812, sec. 4, it is provided that the commissioner of the general land office shall provide a seal of office, and that "copies of any [*373] records, books *or papers belonging to said office, under the signature of said commissioner, or, when the office shall be vacant, under the signature of the chief clerk, and the said seal, shall be competent evidence in all cases in which the original records, books or papers could be evidence." The original of the paper in question legally belonged to that office, and like other "records, books and papers" deposited there by law, could not be removed. By the common law rules of evidence, a sworn copy would have been competent testimony; but to compel suitors all over the *United States*, to procure evidence of that character from the offices of the federal government, would be attended with great inconvenience. To obviate this evil, Congress has provided that copies, certified under the seals of the State and Treasury Departments, and of the Land and Post Offices, shall be received as evidence in all cases in which the original could be evidence. To require proof of the genuineness of these seals would be attended with difficulty, little, if any, less than that of procuring sworn copies. We are, therefore, of opinion that it was the design of Congress to place the seals of these offices on a footing with the seals of Courts of record; and that, consequently, the seal of the General Land Office, and the signature of the commissioner, to copies of originals required by law to be deposited in that office, *prima facie* prove themselves.

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We have seen no case in which this question has been raised in the federal Courts; though several cases have been decided in those tribunals, in which the seals of some of the offices before mentioned have been received in evidence without question of their authenticity, or proof of their genuineness. *United States v. Benner*, 1 Bald. R., 234; *United States v. Willard et al.*, 1 Paine's R., 539; *Bleecker v. Bond*, 3 Wash. Rep., 529; *Smith v. United States*, 5 Peters, 292. In *New York*, certificates under the seals of the Secretaries of State, and the Treasury, have been considered in the character of *exemplifications* of records of Courts. *Peck v. Farrington et al.*, 9 Wend., 44; *Catlett et al. v. The Pacif. Ins. Co.*, 1 Wend., 561.

5. The lessors of the plaintiff offered in evidence a special act of Congress, confirming an location and survey, made by the surveyor general on the west side of the river, of the two sections of land granted to *Lafontaine* and son by the treaty of *St. Mary's*, and declaring the same [374] valid under the treaty. This act was passed June the 30th, 1834, at which time the elder *Lafontaine* was dead. They also offered to prove by parol, that that location and survey were made at the request of *Lafontaine*, and under the direction of the Indian agent. Both the special law and the parol testimony were given in evidence against the objection of the defendants.

This act of Congress, passed after the death of *Lafontaine*, could have no efficacy in creating or confirming in him a title to the land; and in this point of view, it was not competent evidence; but in another aspect—as explanatory of the treaty, which is the source of his title, both the law and the parol testimony were admissible. And on this principle alone is it, that the admission of the location and survey (which we have just considered in reference to the authentication of the copy), can be sustained.

We are aware that no general doctrine of law is better settled, than that an instrument of writing can not be varied or contradicted by extrinsic evidence—whether documentary or parol. But it is also settled, that when such an instrument,

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especially if it be a grant or a charter, is so equivocally expressed as to render it doubtful to what object it refers, or evident that a mistake has been committed in the description of the premises granted, as to location or boundaries, it is competent to resort to evidence *aliunde*, even parol testimony, for the purpose of ascertaining that object, or of explaining and elucidating the ambiguity which creates the difficulty. 8 Term R., 379; *Wadley v. Bayliss*, 5 Taunt., 752; *Beaumont et ux v. Field*, 1 B. & Ald., 247; *Doe, ex. d. Bainbridge*, v. *Statham et al.*, 7 D. & Ry. 141; *Lessee of Dinkle v. Marshall*, 3 Binn., 587; *White v. Eagan*, 1 Bay's R., 247; *Middleton v. Perry*, 2 Bay's R., 539; *Helm v. Small*, Hardin's Rep., 369; *Steel's Heirs v. Taylor*. 2 Marsh., 225; *Chapman v. Bennett*, 2 Leigh's Rep., 329.

There is an ambiguity of expression, evidently amounting to a mistake, in those clauses of the treaty of *St. Mary's* which have reference to the two sections of land granted to *Lafontaine* and son. In one part, they are located adjacent to land granted to *Richardville*, on the east side of the river; in another, they are said to adjoin a tract granted to the son of *G. Hunt*, on the opposite bank. These portions of [*375] the treaty, *therefore, come directly within the principle of law above stated, and are susceptible of explanation by extrinsic evidence. But even if this incongruity in the terms of the treaty had not existed, other testimony than that arising from that instrument, would have been necessary to show most of the boundaries of the land granted to *Lafontaine* and son. The treaty designates no other bounds than abutting it on one side, either on the land of *Richardville*, or on that of the son of *G. Hunt*; nor was it under the circumstances existing at the time, practicable to give it a minute description. It was a small portion of a large tract of unsurveyed land ceded by the *Miami* Indians to the *United States*, by the same treaty which contains the grant to *Lafontaine* and son. Metes and bounds could only be given to this grant, by means of a subsequent survey, which must from the beginning have been contemplated by all parties

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concerned. That survey has been made under the authority of the *United States*, with the approbation of *Lafontaine*, as early as 1823, he not then having parted with his interest in the land; this location was afterwards sanctioned by him, as the record shows, by asking permission, as he was bound to do by the treaty, of the president of the *United States* to sell the land so surveyed; by the president in granting that permission; and finally by the federal government, as late as 1834, by enacting the special law of Congress. These facts, constituting a practical construction of the treaty through a course of years, explaining the ambiguity of its terms, and indicating the land intended to be granted to *Lafontaine* and son, were, we think, correctly suffered to go to the jury.

6. *Hanna*, one of the lessors of the plaintiff, having made an affidavit of the loss of a written petition presented to President *Monroe* by *F. Lafontaine*, for leave to sell one of the sections of land granted to him and his son by the treaty of *St. Mary's*, and surveyed by the surveyor general, and also of the loss of the original permission to sell, granted by the president and indorsed on the petition, the plaintiff offered in evidence sworn copies of the petition and license. They were objected to by the defendants; but the objection was overruled.

It is urged that these copies were not competent, because only one of the lessors of the plaintiff swore to the loss of the originals; and because authenticated copies from the [*376] treasury *department, or some other department of the federal government, would have been evidence of a higher character. These objections can not be sustained. The oath of one of several plaintiffs to the loss of an instrument of writing, is sufficient to let in secondary evidence of its contents. The affidavit in this case is positive to the fact of loss. The oath of the other lessor could only have been cumulative testimony; for we can not presume that it would have contradicted the affidavit of *Hanna*. *Turnipseed v. Hawkins*, 1 M'Cord, 272. If there is any difference as to the competency of sworn and certified copies of papers in any

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case, there is no reason for noticing the distinction on this occasion, because we do not know that the papers in question were actually registered, or required by law to be registered, in any public office. The originals themselves, as testified by *Hanna*, had been in his possession, and were lost.

Three deeds, through which the lessors of the plaintiff derived title from *F. Lafontaine*, were given in evidence. As every question arising from their admission has been attended to in the previous points of this case, it is unnecessary to notice them further than to say they were competent testimony.

7. The evidence being closed, the defendants moved the Court to instruct the jury that they "must construe the deeds and the treaty given in evidence by inspection, and could not receive evidence of their meaning in case an ambiguity is discovered on their face." This instruction the Court refused to give, but charged the jury, "that although the treaty might designate the reservation of said land to *Lafontaine* to be on the east side of the *St. Mary's* river, and although the deed from *Lafontaine* to *Barnett* and *Hanna* for said land describes it as it is described in the treaty, or refers to said treaty for its description, and although the said *Lafontaine* died long before the special act of Congress had passed, leaving one son who is still alive, still the jury might receive as evidence and look upon the special law of Congress, as confirming the fee to the said land on the west side of the *St. Mary's* river to *Lafontaine*; and that said deed from him to *Barnett* and *Hanna*, as grantees from the said *Lafontaine*, would vest in the said *Barnett* and *Hanna*, the title in fee to the said land on the west side of said river." The defendants excepted

[*377] to the *refusal of the Court to instruct as requested, and to the charge given. It could not be error to refuse to instruct the jury by what rule *they* should construe the treaty and deeds; because the construction of those instruments belonged to the Court as a matter of law; and connecting them with the explanatory facts in the case, and leaving the whole to the jury, the instruction asked for would have been wrong according to the principles which we have already

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decided. The charge which the Court gave—that although the treaty and deeds located the land granted to *Lafontaine* on the east side of the *St. Mary's* river, the act of Congress, which passed after his death, confirmed a title in him to land on the west side of the river, was erroneous. The charge should have been, that the jury should judge whether the ambiguous treaty, as explained by the extrinsic testimony, did or did not vest in *Lafontaine* the title to land situated on the west side of the river, and that their verdict should be accordingly. The instruction given, though erroneous, however, had a tendency to lead the jury to a correct result; and it is a rule of law that the misdirection of the judge is no cause for setting aside a verdict which is in accordance with the weight of testimony and of justice. *Sinard v. Patterson*, 3 Blackf., 353; *Edmonson v. Machett*, 2 T. R., 4; *Seare v. Prentice*, 8 East. 348; *Depeyster v. Col. Ins. Co.*, 2 Caines, 85. We have looked through the evidence, which is all spread upon the record, and are satisfied that the verdict against the plaintiff in error, at least, is right.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

J. Rariden, J. S. Newman and D. H. Colerick, for the appellant.

H. Cooper, for the appellee.

FLETCHER v. DANA and Others.

PARTNERSHIP—PROOF OF.—Suit by *Charles D. Dana, John D. Wheeler* and *Nicholas Merriweather*, on a promissory note payable to *Dana, Wheeler & Co.*

The declaration described the plaintiffs as partners trading under the [*378] firm of *Dana, Wheeler & Co.*, and *alleged that the note was made to them by the name of the firm. Plea, the general issue. *Held*, that the plaintiffs must prove that they constituted the firm.(a)

(a) *Abernathy v. Reeves*, 7 Ind., 306; *Farley v. Harvey*, 14 Id., 377; 13 Id., 532.

APPEAL from the *Henry* Circuit Court.

DEWEY, J.—*Charles D. Dana, John D. Wheeler and Nicholas Merriweather*, describing themselves as “partners doing business under the name and style of *Dana, Wheeler & Co.*,” declared upon a promissory note payable to “the order of *Dana, Wheeler & Co.*” Plea, the general issue. The cause was submitted to the Court without a jury, and on the trial the only evidence adduced was the note described in the declaration. The Court found for the plaintiffs, and rendered judgment in their favour.

The question raised for our consideration is, whether it was necessary to prove that the plaintiffs constituted the firm of *Dana, Wheeler & Co.*, in order to justify the finding and judgment of the Court.

In suits on written promises made apparently by name to the persons who sue, proof of the promise is all the evidence necessary with regard to the identity of the plaintiff and promisee. In such cases, if the plaintiff is not, in truth, the person to whom the promise is made, that fact should be disclosed by plea. So, if the promise be made to a fictitious or artificial name, the declaration must contain an averment that the plaintiff or plaintiffs is or are the party designated by such fictitious denomination; for without such allegation, the connection of the plaintiff with the cause of action would not appear. (We are considering suits by natural persons and not by corporations.) As it is necessary to make such an allegation in the declaration, so it is necessary to support it by strict proof. The production of the written instrument proves that a promise has been made by the defendant, but it does not show to whom it was made. This the plaintiff must supply by other testimony.

Partners suing on promissory notes or bills of exchange, made or indorsed *specially* to the *firm*, are bound to prove that they constitute the firm. But when they sue on such instruments indorsed in *blank*, no such proof is necessary. A joint or several action may be sustained upon such an instrument without other proof of interest in it than that

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[*379] which *arises from the indorsement itself. The blank may, at any time, be filled at the pleasure of the holder, and thus the name of the plaintiff (one or more), be inserted and the promise rendered express. Chitt. on Bills, 504; *Ord v. Portal*, 3 Camp., 239; *Attwood v. Rattenbury*, 6 J. B. Moore, 579; 2 Stark. Ev., 583, tit. Part; Coll. on Part., 391, 399, 405; *Machell v. Kinnear*, 1 Stark. R. 499.

The foundation of this suit is a promissory note payable to the firm of *Dana, Wheeler & Co.* Certain persons declare upon it, describing themselves as co-partners trading under that firm, and allege that the promise was made to them by the name of the firm. This is equivalent to an averment that they constitute the firm of *Dana, Wheeler & Co.* Not having proved this averment, or shown their interest in the subject-matter of the suit, the finding and judgment of the Circuit Court was not warranted by the evidence.(1)

Per Curiam.—The judgment is reversed with costs. Cause remanded for another trial.

C. B. Smith, for the appellant.

J. Rariden and *J. S. Newman*, for the appellees.

(1) When a note, like that in the text, is payable to partners in the name of the firm, the partnership of the payees need not be proved, whether the suit be by them or an indorsee, unless the execution of the instrument be put in issue by a plea under oath. Stat., 1839, p. 36.

SLAUGHTER, Assignee, v. FOUST and Others.

ASSIGNMENT.—No particular form is necessary to constitute an assignment, in equity, of a chose in action; and the assignment in such case may even be by parol.(a)

SAME—PLEADING.—A bill in chancery for a foreclosure, &c., stated that the mortgagee had, for value received, assigned and indorsed to the complainant the note, to secure which the mortgage was executed, and ordered the

(a) *Strong v. Clem*, 12 Ind., 37; *Stanley v. Beatty*, 4 Id., 134.

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payment to be made to him. *Held*, that the description of the assignment was sufficient in equity.

FORECLOSURE OF MORTGAGE—WHEN HEIR DEFENDANT.—The heir, and not the executor or administrator, of a deceased mortgagor, is the proper party defendant to a bill for a foreclosure and sale of the mortgaged premises.^(b)

FORECLOSURE—EXECUTORS AND ADMINISTRATORS.—The statute which prohibits the commencement of a suit against an executor or administrator, until the expiration of a year from the date of his appointment, does not apply to a bill for a foreclosure, &c., against the heir of the mortgagor.

[*380] APPEAL from the *White* Circuit Court.

DEWEY, J.—*Foust* was indebted to *Fleming* by two promissory notes, which he secured by mortgage; *Fleming* assigned the notes to *Slaughter*, and delivered the mortgage-deed to him. The mortgagor died intestate, leaving a widow and two heirs at law; administration of his estate was granted. The assignee, *Slaughter*, brought his bill in equity against the widow, heirs and administrator, stating the foregoing facts, and praying a foreclosure of the equity of redemption and sale of the mortgaged premises under the statute. General demurrer to the bill by all the defendants, which was overruled. Plea by all the defendants, that one year from the appointment of the administrator had not elapsed at the time of filing the bill. The Court allowed the plea, and dismissed the bill. Complainant appealed.

The objection urged under the demurrer is, that there is not a legal assignment of the notes, agreeably to the statute, alleged in the bill. The statement is, that *Fleming*, for value received, “assigned and indorsed to *Slaughter* the notes, and ordered and appointed the payment thereof to be made to him.”

It is unnecessary to inquire whether this averment shows such a transfer of the legal ownership of the notes, as would enable the assignee to maintain a suit at law upon them in his own name. Choses in action, which, by the common law, are even unsusceptible of such an assignment, are capable of being equitably transferred, so that the purchaser may resort to a Court of chancery for redress, without the aid of the name of

(b) *Newkirk v. Burson*, 21 Ind., 129.

the assignor. No formality is necessary to effect this species of transfer; any transaction between the contracting parties, which indicates their intention to pass the beneficial interest in the instrument from one to the other, is sufficient for that purpose; a debt may be assigned, in equity, by parol, as well as by writing. 2 Story's Eq., 311; *Heath v. Hall*, 4 Taunt., 326; Roberts on Fr., 275. And when a debt, secured by mortgage is so assigned, and the mortgage-deed delivered to the assignee, he becomes invested with all the equitable rights of the mortgagee. *Clearwater v. Rose*, 1 Blackf., 137. The bill in this case contains an averment of the assignment of the notes for a valuable consideration, and of the delivery [*381] of the *mortgage-deed to the assignee. We think the Circuit Court decided right in respect to this objection to the bill.

The demurrer, however, should have been allowed, for another reason, as to one of the defendants—the administrator; he should not have been a party to the suit.

A mortgagee has three modes of enforcing satisfaction of his demand, to which he may resort concurrently, or separately, at his election: he may bring ejectment and thus acquire the rents and profits of the mortgaged premises until his debt be satisfied; or he may sue at law on the evidence of his claim, in which case he looks, in the first instance, to the personal property of the mortgagor; or he may, by a proceeding in chancery, enforce his lien on the land. The result of this latter process, in *England*, is generally a strict foreclosure of the equity of redemption of the mortgagor, and the investment of an absolute estate in the mortgaged premises in the mortgagee. Under the law of this State the equity of redemption is also foreclosed; but the land is sold for the satisfaction of the debt, and the overplus arising from the sale, if any, is returned to the mortgagor. This difference in the result, however, does not change the character of the proceeding; which, in both countries, is *in rem*, and has in view the satisfaction of the debt from the land. If the mortgagor be dead, the remedy is still against the land and seeks not to meddle with the per-

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sonal assets. It is, therefore, well settled by the *English* practice, that the heir, in whom is the equity of redemption, is the only proper defendant in a bill of mere foreclosure. 3 Powell on Mort., Rand's ed., 969; *Bradshaw v. Outram*, 13 Ves., 239; *Duncombe v. Hansley*, 3 P. Will., 333, n.

It is true that, in *England*, there are some exceptions to this rule of strict foreclosure; as for instance, when in consequence of the inadequacy of the security arising from the mortgage, the mortgagee, in his bill, prays an account of the personal estate as well as a sale of the land. To such a bill the executor should be a party with the heir; but the reason of joining them as defendants is not because a sale of the land may be decreed, but because, in addition to the land, the bill seeks to appropriate the personal assets, of which the executor is the representative, to the satisfaction of the debt. 3 Powell on Mort., Rand's ed., 969; *Daniel v. Skipwith*, 2 Bro. C. C., 155; *Fell v. Brown*, Ib., 276. It has also been held [*382] that where *the bill contained an averment, that the executor had been in the receipt of the rents and profits of the mortgaged premises, and had paid the interest and part of the debt, it was necessary to make him a party. *Cholmondeley v. Clinton*, 2 Jac. & Walk., 135. The case before us does not come within the reasons of these exceptions. They aimed at the personalty as well as the pledged land. This bill affects only the latter.

In *Virginia* and *Maryland*, the law respecting the sale of mortgaged premises on a bill of foreclosure is similar to ours. In each of those States, it has been held that it is not proper to join the personal with the real representative of a deceased mortgagor, in proceedings to enforce the lien. *Graham v. Carter*, 2 Hen. & Munf., 6; *David v. Grahame*, 2 Harr. & Gill, 94.

It has been urged that our probate act, by enabling the executor, or administrator, to convert the real estate of a decedent into assets, when the personal property is insufficient to pay his debts, has rendered it necessary to make the personal representative a party to a bill of foreclosure and sale. There would be strength in this position, if that law destroyed the

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lien of a mortgagor upon the land mortgaged, or compelled him first to look to the personal estate. In our opinion it does neither; but on the contrary, we think the object of its provisions on this subject, was to guard and protect specific liens on the real estate of a deceased person. Nor do we conceive that the right of the mortgagee to proceed to foreclosure and sale, without making the personal representative a party, can interfere with the contingent right of the latter to convert the estate into assets for the payment of debts, whenever he may discover the inadequacy of the personalty for that purpose.

It not being necessary or proper to make the administrator a party to the bill, this suit is not embraced in that provision of the statute, which forbids an action to be brought against an executor or administrator until after the lapse of one year from the date of his appointment.

Under this view of the subject the plea is a nullity.

Per Curiam.—The decree is reversed with costs, &c. Cause remanded, &c. The demurrer, except as to the administrator, to be disallowed, and the plea set aside.

A. S. White and *R. A. Lockwood*, for the appellant.

W. M. Jenners, for the appellees.

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*MORELAND v. LEMASTERS.

VENDOR AND PURCHASER—STATUTE OF FRAUDS.—If a purchaser of real estate enter into possession of the property and make improvements on it, under a parol contract of sale, there is a sufficient part-performance of the contract to take it out of the statute of frauds: *a fortiori*, if he have also paid the purchase-money.(a)

SAME—PURCHASER WITH NOTICE.—If a person purchase such estate with notice, actual or constructive, of an outstanding equitable title, his legal title will not affect the outstanding equity.(c)

POSSESSION—NOTICE.—The occupancy of the estate by a third person, whether the purchaser have a knowledge of it or not, is constructive notice to the purchaser of the occupant's title.(d)

(a) *Slater v. Hill*, 10 Ind., 176.

(c) *Walker v. Cox*, 25 Ind., 171.

(d) *Wilson v. Hunter*, 30 Ind., 466.

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SAME—RIGHTS OF PARTIES.—The purchaser of an estate with notice of an outstanding equity, is as much bound as his vendor was to perform the prior contract.

APPEAL from the *Marion* Circuit Court.

BLACKFORD, J.—*Archibald Lemasters* filed a bill in chancery against *Rachael Moreland* and *James Stagg*. The object of the bill is to obtain a decree against *Mrs. Moreland*, for the specific performance of a parol contract, which the complainant made with her in the year 1833, for a certain lot of ground in the town of *Indianapolis*. The bill avers, that the complainant entered into possession of the premises under the contract, and made valuable improvements; and that he has paid the purchase-money. The defendants, in their answers, admit some of the statements in the bill and deny others; and they insist upon the statute of frauds. *Stagg* states that *Mrs. Moreland*, his co-defendant, about the 10th of *July*, 1835, considering herself to be the owner of the lot in question, sold the same to *Richard M. Bell*, an innocent purchaser.

The complainant, in a supplemental bill, makes *Bell* a party, and charges that he fraudulently purchased the lot of *Mrs. Moreland*, with notice of the complainant's equitable title; and that he has commenced an action of disseisin against the complainant, to recover possession of the lot. The prayer of the supplemental bill is that the sale to *Bell* be set aside, the action of disseisin enjoined, and for general relief. The answer of *Bell* avers, that he is a *bona fide* purchaser for a valuable consideration, and denies that he had any notice of the complainant's claim. He admits, however, that he understood, at the time of the purchase, that there was a tenant on the premises, but he says that *Stagg*, who assisted his [*384] mother, *Mrs. *Moreland*, in making the contract, informed him that the occupant had no title, but was merely a tenant at will.

Several depositions were read by the parties; and the cause was then submitted to the Circuit Court upon the bills, answers, exhibits, and depositions. The Circuit Court, considering the parol contract not to be within the statute of

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frauds, in consequence of the complainant's acts of part-performance, but supposing the subsequent purchase by *Bell* to be valid, decreed that Mrs. *Moreland* should make a certain compensation in damages to the complainant for his loss of the property. The bill was dismissed as to *Bell* and the other defendant.

There is some uncertainty as to the facts of this case. We believe them, however, to be as follows:

Mrs. *Moreland*, resident in *Indianapolis*, was the owner of a certificate, executed by the agent of State, for a lot of ground in that town, on which one-fourth of the purchase-money had been paid. *Stagg*, who is Mrs. *Moreland's* son, and who was, at the time, living with her and attending to her business generally, sold the lot in her name to *Lemasters*, in the spring of 1833, by a parol contract. *Lemasters* entered into possession of the lot under the contract, built a house on it, and has resided in the house ever since. He also paid to the agent of State, according to the terms of the contract, a part of the purchase-money due from Mrs. *Moreland* for the lot, and paid to her in work the residue of the price. Mrs. *Moreland* recognized the sale thus made for her by her son; and she knew, without making any objection, that *Lemasters* had, subsequently to the contract, taken possession of the lot, improved it, and resided on it. Mrs. *Moreland* had in her possession the certificate of the agent of State, upon which were indorsed the receipts for payments on the lot made by *Lemasters*. The only reason which Mrs. *Moreland* gave to *Lemasters*, and to some of the witnesses, why she was unwilling to assign the certificate to him, was, that he had not paid for the lot. . Indeed, she admits in her answer, that if *Lemasters* had done the work which he had agreed with *Stagg* to do, she would have complied with the contract. In *September*, 1835, whilst *Lemasters* resided on the lot, Mrs. *Moreland*, with the assistance of *Stagg*, sold the lot to *Bell* for a [*385] valuable consideration, and *assigned to him the certificate; *Bell* having full knowledge that the lot was then in the actual possession of a third person. *Bell* after-

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wards presented the certificate to the Agent of State, with the payments made by *Lemasters* indorsed on it, and received from the agent a conveyance for the premises.

The first question which this case presents is, whether the sale of the lot by Mrs. *Moreland* to *Lemasters* is valid under the statute of frauds?

There is no difficulty in this question. The purchaser's taking possession of the estate, and making improvements on the same, under a parol contract of sale, have always been considered a sufficient part-performance to take the case out of the statute of frauds. *Lester v. Foxcroft*, Colles' Cases in Parliament, 108; *Clinan v. Cooke*, 1 Sch. & Lef., 41; *Johnston v. Glancy et al.*, Nov. term, 1835. The reason given for this doctrine is, that if the vendor were permitted to refuse to comply with an agreement thus executed in part, it would be a fraud upon the vendee. *Frame v. Dawson*, 14 Ves., 386; *Phillips v. Thompson*, 1 Johns. Ch. Rep., 149. The case before us comes within the principle of these decisions. Mrs. *Moreland* knew of the existence of the contract under which *Lemasters* took possession of the lot; which contract had been made in her name, and which she had recognized as her own. She knew that *Lemasters*, subsequently to the contract, was in possession of the lot, improving it and residing on it as his own. It is to be presumed that she knew that he had made the payments to the Agent of State, which became due after the contract was made, for the agent's certificate was in her possession, on which the payments, as made by *Lemasters*, were indorsed. Besides, it was for her and at her request that *Lemasters* performed the labor which, by the contract, he was bound to perform.

The complainant has really done more than the decisions on the subject require, in order to take the case out of the statute of frauds. He has not only entered into possession of the lot, by virtue of the agreement recognized and adopted by Mrs. *Moreland*, made improvements on it, and fixed his residence there, with her knowledge and acquiescence, but he has also paid the purchase-money conformably to the terms of the agreement.

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The second question in the cause is, whether the [*386] complainant *is prevented from obtaining a specific performance of the contract, in consequence of the sale of the lot by Mrs. *Moreland* to *Bell*? This question turns on a single point. If *Bell* purchased with notice, actual or constructive, of the outstanding equity, his legal title will not affect *Lemasters'* claim. The record shows that *Stagg* informed *Bell*, at the time of the purchase, that the lot was in the possession of a third person. The knowledge of that fact was, of itself, sufficient to put *Bell* upon inquiry, and was, consequently, constructive notice of the title of the occupant. *Taylor v. Stibbert*, 2 Ves. jun., 437. It is not material that the representation to *Bell* was, that the occupant was a tenant at will. It was the purchaser's duty, under the circumstances, to make further inquiries, and to examine into the nature and extent of the occupant's interest. Indeed, the fact that a third person was resident on the premises was, of itself, constructive notice of his claim to all persons who might wish to purchase. *Lessee of Billington v. Welsh*, 5 Binney, 129; *Daniels v. Davison*, 16 Ves., 249; *Knox v. Thompson*, 1 Litt., 350; *Fitzhugh v. Croghan*, 2 J. J. Marsh., 434. It may also be observed that the indorsements on the agent's certificate showed *Bell*, at the time of his purchase, that most of the payments had been made by *Lemasters*.

We are of opinion, for these reasons, that *Bell* must be considered to be a purchaser with notice of the complainant's equitable title. The consequence is, that Mrs. *Moreland's* assignment to *Bell* of the agent's certificate, and the agent's consequent execution to him of the conveyance, can not stand in the way of the complainant's right to a specific performance of the parol agreement. In consequence of the notice, *Bell* is a *mala fide* purchaser, and is bound to perform the prior contract made by his vendor with the complainant. 2 Story's Eq., 93; *Champion v. Brown*, 6 Johns. Ch. Rep., 398; *Daniels v. Davison*, 17 Ves., 433. But he is entitled to a return from Mrs. *Moreland* of the consideration-money which he paid to her for the lot, with interest.

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Per Curiam.—The decree against Mrs. *Moreland*, and the dismissal of the bill as to *Bell*, are reversed. Cause remanded with instructions, &c.

C. Fletcher, O. Butler and P. Sweetser, for the appellant.

H. Brown, J. L. Ketcham and J. Morrison, for the appellee.

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PRACTICE—CONTINUANCE.—The plaintiff's withdrawing of a general demurrer to a plea in bar and filing a replication in denial of the plea, entitle the defendant, under the statute, to a continuance.

ERROR to the *Tippecanoe* Circuit Court.

BLACKFORD, J.—*Heffner* brought an action of assumpsit against *Taylor* and *Hunt* for hogs sold and delivered. Pleas, non-assumpsit and payment. Verdict and judgment for the plaintiff.

The following proceedings took place in the progress of the cause:

On the seventh day of the term at which the cause was tried, the defendants filed their plea of payment; and on the ninth day of the term, the plaintiff filed a general demurrer to the plea. The Court having thereupon intimated an opinion relative to the validity of the plea, the plaintiff, by leave of the Court, withdrew his demurrer and filed a replication in denial of the plea. The defendants then, in consequence of the withdrawing of the demurrer and filing of the replication, moved for a continuance of the cause; which motion was overruled.

The refusal of the Court to continue the cause, under these circumstances, is the error assigned.

Whether the defendants were entitled to the continuance applied for, depends upon the meaning of the 29th section of the Practice Act. According to this statutory provision, when either party amends his pleading in substance, his opponent is

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entitled to a continuance. It appears to us that the plaintiff's withdrawing of his general demurrer to the plea in bar in this cause, and filing a replication in denial of the plea, produced a substantial change in his pleading, and that the case was thus brought within the spirit of the statute. The defendants were as liable to be surprised by this substitution of an issue in fact in place of an issue in law, as they would have been by the amendment, in substance, of a replication to the plea.

Per Curiam.—The judgment is reversed and the verdict set aside with costs. Cause remanded, &c.

A. S. White and R. A. Lockwood, for the plaintiffs.

J. Pettit, for the defendant.

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*TAYLOR v. MEEK.

CONTRACT TO FORBEAR.—To an action of debt on a promissory note for the payment of \$150 at a future time, the defendant pleaded as to fifty dollars of the amount, that the consideration of the note was a previous debt of \$100, and a promise to delay its collection, and was, therefore, as to fifty dollars, usurious. *Held*, that the promise for the forbearance, as shown by the plea, being in writing and signed by the defendant, was valid under the statute of 1831.

WORD AGREEMENT CONSTRUED.—The word *agreement*, in the above-named statute, relative to the payment of a higher interest, &c., like the same word in the statute of frauds respecting the payment of the debt of another, is used as synonymous with the word *promise*.

STATUTE CONSTRUED.—A contract respecting the payment of interest, made whilst the above-named statute was in force, must be governed by that statute.

TENDER.—Suit on a note by the payee, who had previously promised to receive certain goods, on, &c., at his own house in payment. Plea, that the goods were ready, on, &c., *at the defendant's house*, &c. *Held*, that the plea was bad.

FORBEARANCE AND RELEASE—CONSIDERATION FOR.—*A* owed *B* \$100, and gave his note with two sureties for the amount. Afterwards, in consideration of the forbearance of that debt and of the release of the sureties, *A* gave his note to *B* for the original debt and fifty dollars more, payable at a

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future time. *Held*, that the consideration for the whole of the latter note was valid.

CONTRACT CONSTRUED.--A note for a certain sum was payable on the 27th of June, 1833. The payee promised in writing, at the bottom of the note, to receive a certain number of steers in payment, provided they should be delivered by the first of April, 1833. *Held*, that if the maker failed to deliver the steers by the said first of April, and to pay the note when due, the payee's remedy was an action of debt or assumpsit on the note, for the non-payment of the money.

ERROR to the *Randolph* Circuit Court.

BLACKFORD, J.—This was an action of debt in which *Meek* was the plaintiff and *Taylor* the defendant. The action is founded on a promissory note, dated the 18th of August, 1832, by which the defendant promised to pay the plaintiff \$150, on or before the 27th of June, 1833. At the foot of the note, and below the defendant's signature, there is written the following agreement: "The said *Meek* agrees to take thirty-four head of second rate steer calves in payment of the above note, to be delivered at my house, provided the said *Taylor* delivers the same by the first of April next, otherwise the above note to remain in full force and virtue. 18th August, 1832. *George Meek*."

The defendant pleaded four pleas. 1, *Nil debet*; 2, that the note was given without any good or valuable consideration; concluding with a verification; 3, to fifty dollars of [*389] the demand, that the consideration of the note is usurious in this, that at the date of the note, the defendant owed the plaintiff \$100; and, in consideration that the plaintiff would delay the collection of the debt, the defendant executed the note, and upon no other consideration; wherefore as to fifty dollars the note is usurious; 4, that on the first of April, 1833, the defendant had, at his dwelling-house, thirty-four head of second rate steer calves, ready to be delivered to the plaintiff, and that he has been there always ready, and still is ready, to deliver them to the plaintiff in discharge of the note.

The plaintiff joined issue on the first plea. He replied to the second plea, that the note was given for a good and

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valuable consideration, concluding to the country. To the third and fourth pleas he also replied; and to the replications to those two pleas, the defendant filed a general demurrer.

The Circuit Court decided that the third and fourth pleas were bad. The cause was then submitted to the Court on the first two issues, and a judgment rendered for the plaintiff.

We are first to consider, whether the third plea is valid? This plea states that the original debt due by the defendant, at the date of the note, was \$100; and that to obtain delay, the note was given for \$150. It must be observed that, at the time this note was executed, the statute authorized any rate of interest to be taken, provided the agreement for it was in writing and signed by the party to be charged. Rev. Code, 1831, p. 290. So that this plea, if it shows on its face as the plaintiff contends it does, that the agreement for the interest complained of is in writing under the defendant's hand, it can not be supported. The statement of the plea is, that the sum of fifty dollars, agreed to be paid for the forbearance of the original debt, is included in the note. If that be so, the promise to pay the fifty dollars is in writing and signed by the defendant; which is all the statute requires. It is true, that the statute uses the word *agreement* instead of *promise*, and it is also true, that there are cases in *England* and in this country, in which, in construing one of the sections of the statute of frauds, a distinction has been supposed to exist between the meaning of these two words. There are also, however, several cases in the State Courts in which this distinction is held not to be well founded. It appears [*390] to us, *that the word *agreement*, both in our statute of frauds and in the statute of usury now under consideration, is used as synonymous with the word *promise*; and that the note before us, including, as the plea alleges, the fifty dollars for forbearance, is a valid agreement in writing for the payment of the interest complained of. It is not necessary that the written promise to be valid, should show the consideration for which it was made. The consequence of this construction of the statute is, that the agreement for the

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fifty dollars, which the plea attempts to impeach, is shown to be valid by the plea itself. The circumstance, that the law authorizing such agreements for interest was changed before the note became due, makes no difference. The new statute does not affect the validity of contracts made before its passage.

The next question is as to the second plea. The agreement attached to the note is, that the amount might be discharged by the delivery on a certain day, *at the plaintiff's house*, of thirty-four steer calves. The plea is, a readiness to deliver the steer calves on the day, *at the defendant's house*. This plea is obviously bad.

With regard to the trial of the issues in fact, the first question raised is, whether the consideration of the note is sufficient? The facts as to the consideration are these: *Meek* had lent *Taylor* \$100, and had taken his note for the amount, with two sureties, payable eighteen months after date. The sureties being dissatisfied, *Taylor* offered to execute his own note to *Meek* for \$150, if he would release the sureties. *Meek* consented to the proposition, and the note in question was accordingly executed by the defendant. There can be no doubt, but that this consideration for the note is valid. The ground of the objection only applies to the consideration of the promise to pay the additional fifty dollars. If the only consideration for that promise had been the plaintiff's forbearance of payment of the original debt, until the time fixed for the payment of the note, that would have been a legal consideration. The only objection is, that it was a promise to pay more than the legal interest for the forbearance of payment of the original debt for the time agreed on. But an answer to that objection has already been given in a previous part of this opinion. The agreement complained of was authorized by the law which was in force when

[*391] the agreement *was made. The truth is, however, that the giving time for the payment of the original debt, was not the only consideration of the defendant's promise to pay the additional fifty dollars. There was another consideration for that promise, which was of a different kind and

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equally as valid. That consideration was, the plaintiff's releasing, at the defendant's request, the two sureties who were previously bound for the original debt. By the release of those sureties, the plaintiff gave up such an advantage, and subjected himself to such a possibility of loss, as constituted a legal consideration for the promise in question.

The second question which arises out of the proceedings at the trial is, whether the plaintiff was entitled to recover the amount for which the note was given, or the value of the steers which he had agreed to receive in discharge of the note? With a view to this question, it was agreed by the parties that the steers were worth \$100, at the time they were to have been delivered. There is one feature in the cause which very clearly settles this point. The note is for the payment of \$150, and was a *bona fide* debt, founded, as we have shown, upon a legal consideration, and was made payable on the *27th of June*, 1833. The plaintiff agreed to receive the steers in discharge of the note, provided they should be delivered by the *first of April*, 1833, which was nearly three months before the note became due. It is evident, that the defendant's failure to deliver the steers on the day, did not give the plaintiff a cause of action. A suit for the non-delivery of the steers at the time the failure occurred, must have been founded on a breach of contract. Such an action, had it been brought, would have been at once defeated in consequence of the single fact, that the note, which contained the only contract made by the defendant with the plaintiff, was not yet due; and, of course, no breach of the defendant's contract could have then accrued. If the defendant neglected to avail himself of the privilege to deliver the steers on the *first of April*, 1833, and also failed to pay the note on the *27th of June* following, he then became liable to a suit, not, however, for the non-delivery of the steers, but for the non-payment of the \$150 due by the note.

There is one other objection made to the judgment; which is, that an action of debt will not lie in the case. Had
[*392] this *been a contract for the payment of \$150 in

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steers, perhaps the objection would have been tenable. There are, certainly, several decisions to that effect. But this is a different case. Here is a note for the payment of a certain sum of money, executed on a valid consideration, and on which an action of debt will lie, unless the character of the note is changed, by the agreement attached to it, into a contract for a delivery of the steers. That agreement, however, as we have already stated, can not have such an effect. The only action sustainable against the defendant, was for the recovery of the money due on the note when it became payable, and that was an action of debt or assumpsit at the election of the plaintiff.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

J. Rariden, and *J. S. Newman*, for the plaintiff.

J. Perry, for the defendant.

WARNER v. HATFIELD.

VENDOR AND PURCHASER—CONCURRENT ACTS.—If, in the case of a sale of real estate, the deed is to be made and the price paid on the same day, the vendor can not sue for the price unless he has, of his own accord, performed or offered to perform his part of the contract.

SAME—PLEADING.—To such suit, a plea stating that the plaintiff had not executed the deed (omitting to state that he had not offered to execute it), is insufficient.

PLEADING.—Pleadings must contain facts—not matters of law.(a)

UNEXPIRED LEASES—INCUMBRANCES.—A contract to execute a good and sufficient title to real estate can not be complied with, whilst a part of the premises are held by third persons under unexpired leases.

APPEAL from the *Henry* Circuit Court.

BLACKFORD, J.—An action of debt was brought by *Hatfield* against *Warner*, on a sealed note for \$650, which is dated on the 26th of *October*, 1835, and made payable on the first of *March*, 1837. The defendant pleaded three special pleas in bar.

(a) See *Hassleback v. Sinton*, 17 Ind., 549.

1. That the defendant, on the 26th of *October*, 1835, bought of the plaintiff a certain tract of land, and gave the [*393] note in *consideration that the plaintiff would, on the first of *March*, 1837, execute to the defendant a good and sufficient deed in fee-simple for the land, and for no other consideration whatever. The plea then avers that the plaintiff neither did nor would, on the first of *March*, 1837, or at any other time, make or cause to be made to the defendant the said deed for the land, but that he had hitherto refused and still did refuse to do so; and that the consideration of the note had therefore failed.

2. That on the 26th of *October*, 1835, the plaintiff agreed, by a writing obligatory, to sell to the defendant a certain tract of land; that the defendant agreed to pay the plaintiff \$650 on the first of *March*, 1837, \$500 on the first of *March*, 1839, &c.; that the plaintiff, by his obligation, agreed that on the first of *March*, 1837, he would make a good and sufficient title to the defendant for the land, if the defendant should pay the \$650. This plea then avers that the note sued on was given for the payment of the \$650 on the first of *March*, 1837, and in consideration that the plaintiff would make to the defendant a good and sufficient title for the land on the first of *March*, 1837, if the defendant should make that payment, and for no other consideration. It is also averred that the plaintiff neither did nor would, on the first of *March*, 1837, or at any other time, make or offer to make a good and sufficient title for the land to the defendant, but that he had hitherto refused and still did refuse to do so; and that the consideration of the note had therefore failed.

3. That the defendant executed the note in consideration that the plaintiff would, on the first of *March*, 1837, make the defendant a good and sufficient title to a certain tract of land, if the defendant should, on the first of *March*, 1837, pay to the plaintiff the \$650 in the note specified, and for no other consideration. It is then averred that the plaintiff, before the making of the agreement and of the writing obligatory, executed to one *Anthony Holmes* and one *James Hamilton*, each, a

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lease for ten acres of the land for the term of four years, which leases were in full force and unexpired; and that the twenty acres of land had been, ever since the execution of the leases, and still were, in the possession of *Holmes* and *Hamilton*. It is further averred, that the plaintiff neither did nor could, on the first of *March*, 1837, or at any other time, make [*394] or *cause to be made, or offer to make, to the defendant a good and sufficient title for the land, but that he had hitherto refused and still did refuse to do so; and that the consideration of the note had therefore failed.

The plaintiff having obtained *oyer* of the title-bond, the substance of which is set out in the second plea, replied to the first and second pleas, that the defendant had never requested the plaintiff to execute and deliver the deed of conveyance in the condition of the title-bond mentioned; concluding with a verification. To the third plea the plaintiff replied, that he did not, by the agreement in that plea mentioned, undertake to convey to the defendant the land therein described free from all incumbrances; concluding with a verification. To each of these replications, the defendant filed a general demurrer; and the Court, considering the pleas to be all insufficient, gave judgment in favour of the plaintiff for the amount of the note.

The replications are both evidently bad. The first relies upon the single fact that the defendant had not made a demand of the deed. If the defendant, after having complied or offered to comply with his part of the contract, had sued the plaintiff for not executing the deed, the action could not have been sustained without proof that the deed had been demanded. *Sheets v. Andrews*, Nov. term, 1829. But no such demand need be shown by the purchaser when he is a defendant. If, in such case, the acts of the parties were to be concurrent, and the vendor has not, of his own accord, performed or offered to perform his part of the contract, the suit must fall.

The second replication is also untenable. The plaintiff sets out the title-bond, which is conditioned for the plaintiff's

making a good and sufficient title to the defendant for the premises; and he then says that he did not, by this agreement, undertake to convey to the defendant the land free from all incumbrances. This is not stating a fact, but a conclusion of law. The plaintiff admits that he agreed to make a good and sufficient title to the land, but he says he is not by that bound to make a title free from incumbrances. Whether such is the legal effect of the agreement or not, is a question not of fact but of law; and it can not, therefore, be directly raised by replication.

[*395] *The pleas in the cause are next to be examined.

The first plea can not be sustained. The execution of the deed and the payment of the note were to take place at the same time and were to be concurrent acts. It was sufficient for the plaintiff's recovery if, at the appointed time and at the proper place, he was ready and willing to execute the deed and receive the money, and offered to do so, of which the defendant had notice. *Rawson v. Johnson*, 1 East. 203. The plea, therefore, should have averred not only that the plaintiff did not execute the deed, but also that he did not offer to execute it.

The second plea, which is in other respects similar to the first, contains the averment that the plaintiff did not offer to execute the deed. It is not, therefore, subject to the objection made to the first plea; and it is a good bar to the action.

There can be no objection to the third plea. The plaintiff was bound to make, or offer to make, a good and sufficient title to the land before he could sue on the note. His part of the contract, therefore, could not be performed, whilst a considerable part of the land was in the possession of persons holding under unexpired leases.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. B. Smith and *D. Macy* for the appellant.

J. Rariden, *J. S. Newman* and *D. Kilgore*, for the appellee.

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COFFIN v. ANDERSON.

TROVER.—The *gist* of the action of trover is the *conversion of the plaintiff's goods*; and no special plea in bar of the action can be good, unless it confess and avoid the conversion.

SAME—DEPOSIT.—A plea in trover for bank notes, that the defendant as cashier of a bank received them in bank from the holder, on special deposit, is bad.

SAME—PLEADING.—If the plaintiff's interest in the goods for which trover is brought be not sufficient to sustain the suit, the proper plea is not guilty.

IMPEACHMENT OF WITNESS.—If a witness be impeached by proof of his having previously made statements inconsistent with his testimony, he may be corroborated by evidence of other statements made by him in accordance with his testimony. *Aliter*, if he has not been thus impeached.(a)

[*396] **DEPOSITIONS—NOTICE TO TAKE.**—*A notice to take depositions may be served on the attorney, and the service may be proved by his written acknowledgment.

BANKING—SPECIAL DEPOSIT.—The receiving of bank notes in a bank on special deposit, is as much a bank transaction as the receiving of them on general deposit; but the nature of these two kinds of deposits is very different.

SAME.—When bank notes are received in bank on general deposit, they become the property of the bank, and their amount is a debt payable on demand by the bank to the person entitled to it. If payment in such case he afterwards refused, the creditor's only remedy is an action of *debt* or *assumpsit* against the bank.(b)

SAME—CONVERSION.—But if the deposit of the notes be special, there is no change of property, and the deposit is nothing but a bailment. The conversion of such a deposit by the cashier is a *tortious* act, for which he is individually liable in an action of *trover*.

SAME.—If a person refuse to deliver goods in his possession to the owner, saying that they belong to another, such refusal is evidence of a conversion.

TROVER FOR BANK NOTES OBTAINED BY FORGERY.—Trover for bank notes can not be sustained for want of property in the plaintiff, if it appear that he had obtained the notes by means of a forgery committed by himself or with his knowledge; and the forgery, &c., may be proved by circumstantial evidence.

SAME.—Where bank notes have been obtained from the owner by means of a forgery, and have been received by a third person *bona fide*, for value, and without notice, the claim of such third person, if he was guilty of gross negligence in taking the notes, must yield to that of the original owner.

 (a) *Perkins v. The State*, 4 Ind., 222; *Dailey v. The State*, 28 Ind., 285.

 (b) *The State, &c. v. Clark*, 4 Ind., 315; *Hill v. Haverstick*, 17 Ind., 517.

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SAME.—The *bona fide* possession of goods gives a sufficient property to the possessor to enable him to maintain an action of trover for them against a wrong-doer.

SAME.—A obtained certain bank notes from a bank by means of a forgery, and afterwards exchanged them with another bank and with individuals for other bank notes. Held, that the bank imposed on by the forgery was entitled to the last-mentioned bank notes, which were in A's possession and had been received by him as aforesaid, as its property.

ERROR to the Wayne Circuit Court.

BLACKFORD, J.—This was an action of trover brought by Anderson against Coffin. The declaration charges the defendant with converting, to his own use, certain bank notes belonging to the plaintiff, of the value of \$6,000. The defendant pleaded the general issue, and also the following three special pleas. 1st, That the defendant, as cashier of the Richmond branch bank, received the notes into the bank, on special deposit, from one Samuel W. Forsha, the holder of the notes. 2d, That the notes were the property of the Richmond branch bank, of which the defendant was cashier, and that the defendant retained the notes in the bank for its use. 3d, That the notes were the property of the Bank of Massillon, in the State of Ohio; and that the defendant, as cashier of the Richmond branch bank, received the notes on [*397] *deposit from one Samuel W. Forsha, to be kept for the Bank of Massillon. The special pleas were all demurred to specially, on the ground that they amount to the general issue; and the demurrers were sustained. The parties went to trial on the general issue; and the plaintiff obtained a verdict and judgment for the sum of \$3,398.

The first special plea is bad. The declaration charges the defendant with wrongfully converting, to his own use, certain bank notes, the property of the plaintiff. The plea attempts to answer the charge by saying that the defendant, as cashier of a certain bank, received the notes into the bank, on special deposit, from the holder of them. But this is no answer to the charge. The *gist* of the action of trover is the *conversion of the plaintiff's goods*; and no special plea in bar of the action can be good, unless it confess and avoid the conversion.

The plea before us has reference merely to the manner in which the notes came into the defendant's hands, which is entirely an immaterial matter. It is obvious that the conversion of the notes as charged, is not answered by an averment that they were received into the bank by the defendant on special deposit. Such a plea does not go to the point of the action, which is the conversion. If the defendant had had nothing more to do with the notes than merely to receive them into the bank on deposit, he had committed no conversion of them; and, in that case, his proper plea was not guilty. It has been decided, that a special plea, relying on a lawful detainer of goods on account of a lien, or for salvage, or for a distress, is not good in an action of trover. The reason is, that the plea does not admit and avoid the *conversion*, for which alone the suit is brought. *Hartfort v. Jones*, 1 Ld. Raym., 393; *Agar v. Lisle*, Hobart, 187; Gould on Pl., 345. And if such pleas, showing the goods to be lawfully detained for a special purpose, are not admissible, *a fortiori*, the plea now in question, which shows merely a lawful receipt of the goods, is not a proper answer to the suit. The only legitimate plea, in any of these cases, is the general issue.

The second and third special pleas are only an indirect denial of the plaintiff's property in the notes. The second avers that the notes belonged to the *Richmond Branch Bank*; and the third, that they belonged to the *Bank of Massillon*.

The defense contained in these pleas, assuming it to [*398] be a good *bar to the suit, should have been taken advantage of under the general issue. The pleas are only a denial, in an argumentative form, of the alleged conversion of the plaintiff's goods. If the plaintiff had not such an interest in the property as would authorize him to sue in trover, the defendant's proper plea was not guilty. The law is so stated in *Lynner v. Wood*, Cro. Car., 157, in Gould on Pleading, 346, and by Lord Kenyon in *Webb v. Fox*, 7 T. R., 387.

We are therefore of opinion, that the demurrers to the special pleas were correctly sustained.

On the trial of the cause, the defendant filed several bills of exceptions.

The first bill shows the following facts: The defendant proved by *Forsha*, one of the witnesses, that the plaintiff, on his being arrested on a charge of having obtained the notes in question from the *Massillon* bank by means of a forgery, exclaimed that he had no *Massillon* money. The plaintiff, then, in order to impeach *Forsha's* testimony, proved by some of the defendant's witnesses, on their cross-examination, that they had heard *Forsha* previously relate the circumstances of the arrest, without his mentioning that the plaintiff had exclaimed at the time, that "he had no *Massillon* money." The defendant, in reply to this evidence impeaching *Forsha's* testimony, offered to prove that *Forsha* had related the facts to others as he had now detailed them. This evidence in reply, thus offered by the defendant, was objected to by the plaintiff, and the objection was sustained.

If the testimony in question, which the defendant proposed to introduce in order to corroborate *Forsha's* evidence, had been offered in the first instance, before the evidence given by *Forsha* had been impeached, we should have considered it to be inadmissible. There are indeed, authorities for the admissibility of the evidence, although the witness had not been impeached. *Lutterell v. Reynell*, 1 Mod. Rep., 283; *Gilbert's Ev.*, 150; 2 Hawk. Pl. Cr., 431. But that point has been decided otherwise, and we think correctly. *The King v. Parker*, 3 Dougl., 242; *Buller's N. P.*, 294; *Jackson v. Etz*, 5 Cowen, 314. If the witness has not been impeached, by proof of his having previously made statements inconsistent with his testimony, there seems to us to be no sufficient reason

for the introduction of the corroborating evidence.

[*399] But it is *otherwise, if the witness has been thus impeached; it appears then to be proper to give the party who called the witness an opportunity to support him, by proving that the witness had, on other occasions, stated the facts to be as he represents them in his testimony. There are several cases directly in favour of the admission, under these

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circumstances, of this corroborating evidence. *Cooke v. Curtis*, 6 Harr. & Johns., 93; *Lessee of Packer v. Gonsalus*, 1 Serg. & Rawle, 536, by Tilghman, C. Jus; *Lessee of Wright v. Deklyne*, 1 Peters' Cir. Court Rep., 203; *The People v. Vane*, 12 Wend., 78. It is true, that it is said by Mr. *Starkie*, that the better opinion is the other way. 1 *Starkie on Ev.*, 187. But the *English* authorities are contradictory, and the weight of the *American* cases is decidedly in favour of admitting the evidence.

We consider, therefore, that the Circuit Court erred in rejecting the testimony.

The second bill of exceptions shows, that the deposition of *James Rockwell*, the teller of the Commercial Bank of Lake *Erie*, was offered in evidence by the defendant, but was rejected. The only ground of objection to the admission of this deposition is, that there was no legal notice of taking it. The evidence relative to the notice is as follows: The written acknowledgment of *Griswold* and *Grant* as attorneys of the plaintiff, that they had received due notice of the taking of the deposition, was produced. It was proved that those gentlemen were attorneys at law, and resident in the same town in the State of *Ohio* with the plaintiff; that they had assisted him as his attorney—he being present—in taking several of the depositions in the cause; and that they had defended him, a short time before, as his attorneys in a criminal prosecution in *Ohio*, relative to the forgery with which this cause is connected. These facts are sufficient, in the absence of any rebutting testimony, to show that the gentlemen who made the acknowledgment in question, were the attorneys in the cause for the plaintiff. That being so, and as the statute authorizes the notice to be served on the attorney, it follows that the present acknowledgment of service is good. The deposition under consideration ought, therefore, to have been admitted.

The third bill of exceptions sets out the evidence, and shows that certain instructions to the jury were asked for by
[*400] the *defendant and refused; and that certain other instructions were given by the Court, to which the

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defendant excepted. The facts proved, as shown by this bill of exceptions, are substantially as follows:

On the 25th of *May*, 1836, *John Mendenhall* deposited to his own credit \$400 in the Commercial Bank of *New Lisbon*, in *Ohio*, and took a certificate of the deposit. On the same day he indorsed the certificate to *Cyrus* and *George Mendenhall*, inclosed it in a letter directed to *Cyrus Mendenhall*, at *Cleveland*, *Ohio*, and put the letter into the post office at *New Lisbon*.

On the 6th of *June*, 1836, a man calling himself *George Stevens*, presented a letter of introduction to one *Thomas Blackburn* at *Massillon*, *Ohio*, dated the first of *June*, 1836, and signed *Jacob Roller*, requesting *Blackburn* to assist *Stevens*, the bearer of the letter, in obtaining land office money for a certificate of deposit given by the *New Lisbon* bank. *Blackburn*, on the same day, introduced the bearer of the letter to the cashier of the Bank of *Massillon*; and, on the next day, the same man, calling himself *Stevens*, obtained from the last-named bank, payment for the certificate of deposit given by the *New Lisbon* bank; which certificate appeared to be for the payment of \$7,400. This certificate was payable to the order of *John Mendenhall*, indorsed by him to *Cyrus* and *George Mendenhall*, and appeared to be indorsed by them to *George Stevens*.

The payment was made by the *Massillon* bank to the person calling himself *Stevens*, as follows, viz., by the notes of that bank for \$4,000, and by a certificate of deposit given by the same bank for \$3,400. The certificate of deposit, thus given by the *Massillon* bank, was afterwards, by the Commercial Bank of Lake *Erie* at *Cleveland*, paid to the person calling himself *Stevens*, and was sent back to the *Massillon* bank, and the amount was there credited to the Commercial Bank of Lake *Erie*. The payment of the \$4,000, which was made by the *Massillon* bank in its own notes, was in notes of the following description: \$1,000 in notes of \$100 each; \$1,000 in notes of fifty dollars each; \$1,500 in notes of twenty dollars each; and the balance in ten dollar notes.

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[*401] The teller of the bank, in order that the *notes might be known, when they returned, put a private mark on all of them, except those of ten dollars. That mark was the letter *S* in red ink.

The *Massillon* bank, in two or three days after this transaction, discovered that the certificate on the *New Lisbon* bank had been feloniously altered from \$400 to \$7,400; and immediate notice of the fraud was given by the *Massillon* bank to the public, by means of printed bills, and a reward of \$500 was offered for the apprehension of the offender. The suspicions of the bank, as to the perpetration of the forgery, were very soon fixed on *James Anderson*, the plaintiff in the present suit, who resided at *Canton*, which is eight miles from *Massillon*, thirty-five miles from *New Lisbon* and sixty miles from *Cleveland*.

On the 11th of *June*, 1836, the fourth day after the fraudulent receipt of the notes from the *Massillon* bank, *Anderson* left *Canton* in a stage-coach for the west, and was pursued the next day by *Brown*, the agent of the *Massillon* bank. *Anderson* changed his name on the way, by calling himself *Andrews*, and was observed, as he passed westwardly through *Ohio*, to have a large amount of notes, apparently new, on the *Massillon* bank, which were of the same description, and had the same private mark, as the notes paid by that bank on the forged certificate. He had also with him a large amount of notes on the Commercial Bank of Lake *Erie*; and he exchanged on the route several of the *Massillon* bank notes, having the private mark on them, for the notes of other banks, showing a great anxiety to do so. On the 16th of *June*, 1836, *Anderson* exchanged, at the *Richmond* branch of the State Bank of *Indiana*, \$2,270 of *Massillon* bank notes, having the private mark on them, some of which were \$100, some fifty and some twenty dollar notes. For these notes *Anderson* received, from the *Richmond* branch bank, notes on the State Bank of *Indiana*. *Brown*, the agent of the *Massillon* bank, overtook *Anderson* at *Richmond*, in this State, on the 16th of *June*, 1836, and on the night of that day, just as

Anderson was about to set out in the western stage from *Richmond*, where he had called himself by a different name, *Brown* caused him to be arrested for the fraud committed on the *Massillon* bank.

[*402] **Forsha*, the officer who made the arrest, took from *Anderson's* possession \$5,108 in bank notes. Of these notes \$1,710 were on the Commercial Bank of Lake *Erie*, and were new; \$2,375 were on the State Bank of *Indiana*; and the others were on various other western banks. These notes, thus taken from *Anderson*, were immediately placed by *Forsha* in the *Richmond* branch bank on special deposit; the defendant, who received them on deposit, being the cashier of that bank and knowing, at the time, the circumstances under which *Forsha* had obtained them. The receipt of the defendant as cashier, which was given for this deposit, states that the packet of notes so deposited was to be delivered to the order of *Forsha*, on the final determination of a controversy then pending between the attorneys of the Bank of *Massillon* and *Anderson*.

After the notes were so delivered to the defendant, and before the present suit was commenced, the plaintiff demanded the notes of the defendant and the defendant refused to deliver them, alleging that the plaintiff had not come fairly by them, and that they belonged to the *Massillon* bank.

There was proof that the letter, introducing the person calling himself *Stevens* to *Blackburn*, was a forgery and in the plaintiff's hand-writing; that the plaintiff, after his arrest, had made contradictory statements as to how and where he had received the *Massillon* bank notes, telling *Brown*, the agent of the bank that he had received the notes from a stranger on a steamboat in exchange for others, and telling the officer who arrested him that he had received them at *Canton* from a stranger whom he would not again know. There were also some other circumstances of suspicion proved against the plaintiff. There was evidence that *Forsha* had, since this action was commenced, assigned to the *Massillon* bank the certificate of deposit given to him by the defendant; and that

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the defendant is secured by that bank against any damages which he may sustain by this suit.

These are the material facts connected with the cause, and which are necessary to be known in order to form an opinion on the questions raised by the third bill of exceptions. We shall not extend this opinion by an examination of the numerous instructions which were asked for by the [403] defendant, and *which the Court refused to give

All that is necessary for a correct understanding of this part of the cause is, to examine the propriety of the instructions which were given by the Court, and to which the defendant objected.

The Court, in the first of these instructions, stated that one ground of the defense was, that the defendant was the cashier of the *Richmond* branch bank; that he received the money in the bank on special deposit; and that the bank, not the defendant, was liable if any one was. The Court then informed the jury, that this part of the case depended on the question, whether the cashier could be sued, in this form of action, upon a bank transaction? They further said, that, as a general rule, the cashier could not be sued; and that if the act in question was purely a bank transaction, within the scope of the business of the bank, and was performed by the cashier as such, he being entirely ignorant of any of the rights of the parties, the bank alone could be sued; but that if *Anderson* had a right to the notes, and the defendant knew they had been taken from him against his consent, upon a claim of the *Massillon* bank, the defendant was a wrong-doer, and could not avoid the suit on the ground that his receipt of the notes was a bank transaction.

The defendant has no reason to object to this instruction. The ground taken by the defendant is, that his receiving and detaining the notes was entirely a bank transaction, for which the bank and not its cashier, is responsible to the party injured. But this ground can not be supported.

We have no doubt, but that the receiving of a special deposit of bank notes in a bank, is as much a bank transaction,

as the receiving of a general deposit there of bank notes. But the nature and consequences of the two kinds of deposits are, in law, very different. Had the notes in question been received by the cashier on general deposit, they would have thereby become the property of the bank, and their amount would have been a debt, payable on demand by the bank, to the person entitled to it. In that case, the doctrine of the defendant would be applicable. The creditor of the bank could not, in any event, have looked to the cashier for payment. His only remedy for the non-payment would have been against the bank. *Trover*, however, does not lie, even against the bank, for such a deposit. The reason is, [*404] that the bank is not liable *for the specific notes which are received on general deposit; and it is only for the conversion of specific goods that trover will lie. *Orton v. Butler*, 5 Barn. & Ald., 652. The proper and, indeed, the only remedy for the creditor, in the case of a general deposit, if payment be refused, is an action of *debt* or *assumpsit* against the bank for the breach of contract.

But the deposit now under consideration is a special one, and is governed by a different rule from that which relates to general deposits. There was here no change of property in the notes, and the deposit of them was nothing but a bailment. When bank notes are thus specially deposited, they must be specifically delivered at the bank on demand, during banking hours, to the owner; and the refusal so to deliver them, without a sufficient excuse, like the improper refusal of a bailee to deliver the goods bailed, is evidence of a conversion; and trover may be then sustained. The conversion of a special deposit is not merely a breach of contract, but it is a *tortious* act; and it is for this reason, that though the special deposit be a bank transaction, the cashier who wrongfully withholds it can not say to the party injured, you must look to the bank for redress.

It is no doubt true, that there are many cases in which masters have been held accountable for the misfeasanances of their servants. The cases of *Michael v. Alestree*, 2 Levinz,

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172, of *Jones v. Hart*, 2 Salk., 441, of *Bush v. Steinman*, 1 Bos. & Pull. 404, and of *Matthews v. The West London Water Works Co.*, 3 Campb., 403, are of that description. And it may be also true, that the plaintiff, in the case before us, if the notes are his, might have brought his suit against the bank for the alleged misconduct of its cashier. The action would unquestionably have lain against the bank in such case, if the conversion was committed by its express direction. This is shown by the case of *Yarborough v. The Bank of England*, 16 East, 6, which is relied on by the defendant. But admitting it to be established, that the bank is liable for the wrongful act of its cashier, the defendant, in order to avoid this suit, must go further and show that he, himself, is on that account excused. This, it is certain, can not be shown. The liability of an agent for his conversion of a third person's goods, either to his own use or to the use of his principal, is not lessened by the circumstance that the principal is also liable.

[*405] The *conversion is a *tort* and, from the very nature of the act, the person who commits it is at any rate liable to the party injured, whether any other person is so or not. There are authorities to show that an agent is liable in trover for the conversion of goods, although the conversion of them was for the entire use and benefit of his principal. This point is decided in *Perkins v. Smith*, 1 Wils., 328, and in *Stephens v. Elwall*, 4 Maule & Selw., 259. The following late case is also to the same effect:

Trover for a bill of exchange of £200, dated *July*, 1833, drawn by the plaintiff on and accepted by *Plimpton*, payable four months after date, and indorsed by the plaintiff, by *Boyn & Co.*, and by *Roberts*. The defendant acted as clerk to his mother, who carried on the business of a coal merchant. *Roberts*, who was employed by the plaintiff to get the bill discounted, owed the defendant's mother a considerable sum for coals, and instead of procuring the bill to be discounted, indorsed it and placed it in the hands of the defendant, who carried it to the credit of *Roberts'* account with his mother. The defendant was afterwards apprised that *Roberts* had only

been employed to get the bill discounted, and was requested to give the bill up; but he refused to do so, saying he had placed it to his mother's account. The defendant objected to the action, and contended that he had acted in the business as the clerk of his mother, and that the suit should have been brought against her. The Court, however, held the defendant liable. The Chief Justice said, that the general rule is, that in actions of tort all persons concerned in the wrong are liable to be charged as principals; that in *Perkins v. Smith*, 1 Wils., 328, it was held that trover lay against a servant who disposed of goods, the property of another, to his master's use, whether he had any authority or not from his master for so doing. That case, he said, applied to the one then before the Court; and that the son, standing in his mother's shop, could not justify a wrong under the authority of his mother. *Cranch v. White*, 1 Bingh. New Cas., 414.

For these reasons we are satisfied that the defendant can not complain of the instruction to the jury which we have just been considering. If he is in other respects liable, the circumstance that the act complained of was a bank [*406] transaction, in *which the defendant acted merely as an agent, is no justification for him.

The next instruction has reference to the second ground of defense to the suit. The question which is presented by this part of the cause is, whether the defendant's refusal to deliver the notes, in the manner in which they were refused, amounted to a conversion? The facts are as follows: After *Forsha* had delivered the notes to the defendant on special deposit, and before the suit was brought, the plaintiff demanded the notes of the defendant. The defendant's answer was, that he would not deliver them, because the plaintiff had not come fairly by them, and because they belonged to the Bank of *Massillon*. There are, no doubt, many cases in which the refusal to deliver goods to the owner has been so qualified as not to amount to a conversion. If, for example, the defendant has a lien on the goods, and he refuses to deliver them until the lien is discharged, such a qualified refusal is no evidence of a conversion.

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But the law is otherwise if the reason given for the refusal be not a legal one. Thus, where a carpenter who had worked in the queen's yard, discontinued his work, and the surveyor refused to deliver up his tools *until the queen's work was done*, pretending the usage to be so, it was held that the refusal amounted to a conversion. *Baldwin v. Cole*, 6 Mod. Rep. 212. The law is also settled, that if a party refuse to deliver goods to the owner on the ground that they belong to himself, or that they belong to a third person, this refusal amounts to a conversion. 2 Will. Saund., 47 f, notes. In the case now under consideration, the cause assigned by the defendant for his refusal to deliver the notes was, that they belonged to the Bank of *Massillon*. Such a refusal is sufficient evidence of a conversion to enable the plaintiff to recover, if the notes are his; and the Court might, with propriety, have so instructed the jury. *Wilson et al. v. Anderton*, 1 Barn. & Adol., 450. The instruction, however, is not so unfavorable to the defendant. It only considers the cause given for the refusal to be exceptionable in case the defendant knew, when he received the notes, of the existing controversy respecting them. The Court might have gone further and informed the jury that the reason given for the refusal was not a good one, whether the defendant knew or did not know of the existing

[*407] * controversy. It is evident, therefore, that the defendant could not object to this instruction.

The last subject of inquiry which this cause presents for our examination, regards the third ground of defense, and has reference to the instructions of the Court respecting the plaintiff's right of property in the bank notes, for which the suit is brought. The Court stated the ground of defense to this part of the cause to be as follows: That a forgery of a certificate of deposit to the amount of \$7,400, was committed on the *Columbiana Bank of New Lisbon*, which certificate was passed at the Bank of *Massillon* by *George Stevens*; that the *Massillon* bank paid to *Stevens* \$4,000 of the amount in *Massillon* bank notes, and the balance by a draft on the Commercial Bank of Lake *Erie*; that the plaintiff was a party to this

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forgery; and that the bank notes for which the suit was brought, were obtained by *Stevens* on the forged certificate. In this statement, the Court inadvertently speaks of the balance which, after deducting the \$4,000, was due on the forged certificate, as having been paid by a draft on the Commercial Bank of Lake *Erie*. That balance is alleged to have been settled, not by such a draft, but by the giving of a certificate of deposit in the Bank of *Massillon*. There is also another oversight in this statement. The Court omits to mention that a part of the bank notes for which the suit was brought, are alleged to have been obtained from the Commercial Bank of Lake *Erie*, on the certificate of deposit given by the *Massillon* bank. The Court gave to the jury several instructions relative to this part of the defense.

One of these instructions is to the following effect: If the notes on the Commercial Bank of Lake *Erie*, for which the suit is in part brought, were obtained from that bank by a certificate of deposit given by the *Massillon* bank, which certificate was procured by means of a forgery committed by the plaintiff, or with his knowledge, the plaintiff has no title to the notes thus obtained, and the jury ought to find for the defendant as to those notes. This instruction is unobjectionable, and, as far as it goes, is in the defendant's favour.

The following is the substance of another of these instructions: The forgery of the certificate on the Columbian Bank of *New Lisbon* may be proved by circumstantial evidence; and the fact that the plaintiff obtained the notes fraudu-
[*408] lently, *may be proved by the same kind of evidence.

This instruction is correct, and is also in the defendant's favour.

The next instruction is in these words: If *Anderson* came by the notes *bona fide*, for a valuable consideration, and without notice of the forgery, he is entitled to hold them against the bank. The law is not correctly stated in this instruction. It has been decided that where bank notes have been stolen, and the owner has not been guilty of laches, a third person who afterwards receives them, and resists the claim of the

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owner, must show not only that he received them as is here stated by the Court, but also that he received them with due caution. What degree of caution should be used must depend, it has been said, on the nature of the case, and is a proper question for the jury. The security of the public against larcenies, &c., is stated to be the object of this rule. The cases of *Gill v. Cubitt*, 3 Barn. & Cres., 466, and *Snow v. Peacock*, 3 Bingh., 406, in both of which the subject is fully discussed, are authorities for this doctrine. We consider it not to be material whether the notes be stolen or be obtained by means of a forgery. Indeed, the case of *Solomons v. The Bank of England*, 13 East, 135, was trover for a bank note that had been obtained by means of a forged draft; and no attempt was there made to distinguish that case from those in which the notes had been stolen.

The following case was decided in 1833: Trover for a Bank of *England* note for £200, payable to bearer. The plaintiff had been robbed of the note in *September*, 1830, and had advertised his loss in the newspapers. In *June*, 1832, the note was traced to the possession of the defendant, who said he had received it in payment of a bet on the *Derby*, but could not recollect from whom. The Chief Justice, on the trial, left it to the jury to say, whether the defendant had exercised due caution in taking a bank note of so large an amount, without making a memorandum of the name of the person from whom he received it. The jury found a verdict for the plaintiff on the ground that the note had been received without sufficient circumspection. The Court refused a new trial, and used the following language: "The note is traced from the defendant to the plaintiff; it is of such amount that it ought not to have been taken rashly; and yet the defendant says he does not know from whom he took it.

[*409] * Under such circumstances, he can not be said to have used the ordinary precautions, which would be proper on such an occasion. From *Gill v. Cubitt*, 3 B. & C., 466, downwards, the decisions have put the title of the note, not on *bona* or *mala fides*, but on the degree of caution with

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which the note has been received. *Snow v. Peacock*, 3 Bingham, 406, was the case of a bank note for £500, received by bankers in the course of their business; and yet it was held that the plaintiff was entitled to recover, although the defendants had received the note honestly, because, in receiving it, they had not acted with due caution. "In the present case," continues the Court, "the defendant's dealings were not of such a nature as to entitle him to greater latitude than a banker at his counter. We think, therefore, that the principle of *Gill v. Cubitt*, and *Snow v. Peacock*, should apply." *Easley v. Crockford*, 10 Bingham, Rep., 243.

It is true that the Chief Justice said, in *Snow v. Peacock*, that though the negligence of the owner of stolen goods can be no excuse for the dishonesty of the receiver, it may be an excuse for the receiver's negligence, agreeably to the maxim *potior est conditio possidentis*. But even if that doctrine be correct, of which we give no opinion, it does not apply to this case. There was no want of diligence here, imputable to the officers of the Bank of Massillon. They very soon detected the forgery, and issued the proper advertisements, offering the liberal reward of \$500 for the apprehension of the offender. If they have not found him, it is not their fault.

The last cases we have seen on this subject were decided in 1834. They consider the proper inquiry to be, whether the receiver was guilty of *gross negligence*? *Crook v. Jadis*, 5 B. & Adol., 909; *Backhouse v. Harrison*, Id., 1098. These cases, though they differ considerably from that of *Gill v. Cubitt*, and those which followed it, still show that the instruction under consideration ought not to have been given. The question as to the plaintiff's negligence was an important one for the jury—even supposing, which, however, is hardly a supposable case, that he received the notes *bona fide*. The case required, at least, ordinary diligence. The amount received was large; the notes were new, and many of them of the denomination of fifty dollars and \$100; and the person offering them, according to the plaintiff's own account,

[*410] was an entire *stranger whom he should not know

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again. It was the plaintiff's duty, before he received the notes under these circumstances, to make some inquiries respecting the person offering them, as to the means by which such person had obtained them; and it was for the jury to determine whether the plaintiff had performed that duty.

We are therefore of opinion that, according to the authorities on the subject, and the policy of the law, the instruction now under consideration is wrong. The jury ought not to have been informed, that the plaintiff was entitled to hold the notes against the legal owners of them, provided he had received them *bona fide*, for a valuable consideration, and without notice. There was another question for the consideration of the jury, and that was, whether the plaintiff had been guilty of gross negligence in the receipt of the notes.

The following is the next instruction: If these bank notes are the same that were obtained from the Bank of *Massillon*, and the plaintiff was a party to the forgery, he can not retain them against the bank. There can be no objection to this instruction.

The following instruction was also given: If the plaintiff obtained the notes by participation in a forgery, with intent to defraud the owner out of them, and they subsequently came to the possession of the defendant, who retains them for the owner, and had the directions of the owner to retain them from the plaintiff, the defendant may set up those facts as a bar to the action. This instruction is unexceptionable.

The following is the next instruction: Where the plaintiff has a title founded simply on a *bona fide* possession, the defendant can not defend himself by showing that a third person, between whom and himself there is no connection, has a better title than the plaintiff. The question involved in this instruction is not without difficulty. The defendant has referred us to two cases in which a different opinion is expressed from that contained in this instruction. These cases are, *Schermerhorn v. Van Volkenburgh*, 11 Johns. Rep., 529, and *Tanner v. Allison*, 3 Dana's Rep., 422. But there are highly respectable authorities on the other side of the question. The

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instruction is expressly sustained by the opinion of Sergeant *Williams* in his learned note to the case of *Wilbraham v. Snow*, 2 Saund. Rep., 47, and the several authorities which [*411] he *there relies on in support of that opinion. It is also directly supported by the opinion of Mr. *Chitty*, in the first volume of his *Treatise on Pleading*, 6th Lond. Ed., p. 173. This instruction is also in accordance with the opinion of Chief Justice *Parsons*, delivered in the case of *Waterman v. Robinson*, 5 Mass. Rep., 303.

It was decided at an early period, that there may be such a special property, arising out of a lawful possession, as is sufficient to support trover. The case was that of a chimney sweeper's boy who found a jewel, and took it to a goldsmith to know what it was. The goldsmith refused to return it, and the boy sued him in trover. It was held that the plaintiff, having found the jewel, had a right to keep it against all persons but the rightful owner; and that therefore he could maintain trover against the defendant, who was a wrong-doer. *Armory v. Delamirie*, 1 Strange, 505. That case has never been questioned, but has been frequently recognized as being correctly decided. And it would be no easy task to shew, upon principle, that the interest in goods arising from finding them is greater, or is entitled to any more protection from wrong-doers, than that which arises from their *bona fide* possession in any other way, except when in the custody of a mere servant. In *Webb v. Fox*, 7 Term Rep., 387, the judges all express a decided opinion, that a lawful possession of goods gives the possessor a sufficient property to enable him to bring trover for them against a wrong-doer; and in support of the doctrine, *Lawrence, J.*, cites and relies on the case of *Armory v. Delamirie*. The same point is decided and the same case again referred to in its support, in *Sutton v. Buck*, 2 Taunt., 302. There is also a late case from which it appears, that a mere gratuitous bailee has a sufficient property in the goods to enable him to support trover for them. *Burton v. Hughes*, 2 Bingham, 173.

From an examination of these authorities, and all the others

on the subject within our reach, we have come to the conclusion that the instruction of the Court, under consideration, can not be objected to. If the plaintiff's possession of the notes was not *bona fide*, or if the *Massillon* bank was the owner of them, and the deposit was made by a person acting at the instance of any of its agents, or was detained [*412] by the defendant *with the express or implied permission of any such agent, the instruction does not apply to the case.

There is one other instruction to the jury, relative to the third ground of defense, which remains to be noticed. It is as follows: "If these notes are not the identical bank notes obtained from the Bank of *Massillon* on said forged certificate of deposit, the plaintiff is entitled to recover." The doctrine here advanced is, that admitting the *Massillon* bank notes to have belonged to that bank, and to have been obtained from it by the plaintiff by means of a forgery, yet, as the plaintiff has exchanged them for other bank notes, these other notes can not be claimed by the bank, but are the plaintiff's own property. It is impossible that the law can sanction a doctrine that would produce such manifest injustice. There are two principles which are both violated by this instruction.

One is, that the *Massillon* bank has a right, in this case, to consider the plaintiff as its agent, both as to his holding the original notes, and as to his exchanging them for others. The bank claims the notes received in exchange for its property by the plaintiff, and thus adopts and ratifies, as its own, the act of the plaintiff in converting the property of the bank into the notes for which this suit is brought. The plaintiff can not complain on account of his being considered an agent in the transaction instead of a wrong-doer, and there are no rights of third persons affected by this view of the case.

The other principle which is contravened by the opinion of the Circuit Court is, that the *Massillon* bank notes in the plaintiff's hands may be considered as covered with a trust in favour of the bank; and, in that case, the change in the form of the property, though made by the plaintiff without author-

ity, could give him no new claim to it. The *Massillon* bank notes in the plaintiff's hands belonged to the bank, and when the plaintiff thought proper to exchange them for other notes, the bank had a right to follow its property into the new state in which the plaintiff possessed it. This point has been frequently decided. We will refer to some of the authorities.

A factor being entrusted by a merchant to sell some merchandise, sold the same for money, and instead of paying the money over to his principal, he vested it in other goods, and died indebted in debts of a higher nature. It was [*413] decided that *the goods, in such case, belonged to the merchant and not to the factor's estate. *Whitecomb v. Jacob*, 1 Salk., 160. This decision was made in the time of Queen Anne, and is the earliest case on the subject which we have met with in the books. The factor had there sold the merchant's goods for cash, and the money he thus received belonged to his principal. So, in the case before us, *Anderson* was possessed of certain Bank of *Massillon* notes, which, if the bank chose so to consider them, were the property of the *Massillon* Bank. The factor, in the case of *Salkeld*, instead of paying the money in his hands to his creditor, to whom it belonged, bought goods with it for himself, without any authority for that purpose. So, here, *Anderson*, instead of delivering the *Massillon* bank notes to that bank, which was entitled to them, exchanged them, without authority, for other bank notes. The Court held, in *Whitecomb v. Jacob*, that the merchant, with whose money the goods in dispute were purchased, might claim them as his property; so, in our case, the *Massillon* bank, for whose property the notes now in question were exchanged by *Anderson*, may follow its property into the new form, and claim these notes as belonging to itself.

The following is another case on the subject: *Scott & Richardson*, resident in *Carolina*, consigned a quantity of tar to their factor in *London*. The factor sold the tar, and took in part payment two promissory notes payable to himself four months after date. It afterwards became a question, in consequence of the factor's bankruptcy, to whom the promissory

notes belonged? Whether they were the property of the consignors of the tar, or the property of the assignees of the bankrupt factor? It was decided that the notes were the property of the consignors and owners of the tar, in payment for which they had been given, though they were made payable to the bankrupt, and he had delivered them over, as his own, to his assignees. In delivering this opinion, Chief Justice *Willis* says: "We are agreed that if the goods had remained in specie unsold in the bankrupt's hands, at the time of the bankruptcy, the plaintiffs (the consignors) might have recovered them in an action of trover; and the present case may be determined on the same reasons. For why are goods considered still as the owners? because they remain in specie, and so may be distinguished from the rest of the [*414] bankrupt's estate. But as money has no ear-mark, it can not be distinguished. Otherwise, to be sure, in reason, the thing produced ought to follow the nature of the thing out of which it is produced, if it can be distinguished; and so long as it remains a debt, it is equally distinguishable; or if it be laid out in a particular thing, as the case in *Salkeld* is. And the notes are within the same reason." *Scott v. Surman*, Willes' Rep., 400.

This is a strong case in favour of considering the bank notes in question as the property of the Bank of *Massillon*. It is, indeed, in point, provided the circumstance of the notes being bank notes does not make a difference; and we know of no reason why it should make any. Bank notes are not, by their nature, incapable of being identified. They are not generally, it is true, so easily distinguished as other goods are, but that has relation only to the proof. Bank notes, so far as this question is concerned, are on the footing not of money, but of other personal property.

The next case we shall notice is the following: *Sill & Watson*, by means of a fraud, obtained from *Hadwen*, as a loan, certain bills of exchange to a large amount; and they afterwards procured one of these bills to be discounted, and obtained for it bank notes of the Bank of *England*. *Sill &*

Watson became bankrupts, and it was made a question between their assignees and *Hadwen* as to whom the bills of exchange, remaining on hand at the time of the bankruptcy, belonged, and also as to whose property the bank notes were which the bankrupt had received for one of the bills. It was decided, on the authority of *Scott v. Surman*, which we have already noticed, that the bills and bank notes belonged to *Hadwen*, the original owner of the bills. In this case, Lord *Ellenborough*, after showing that the bills continued to be the property of *Hadwen*, the original owner, concluded with these words: "A distinction has been made in argument as to the bank notes, and it has been urged as to them, that although the assignees might have no right to the bills as long as they remained undisposed of, yet they were entitled to the proceeds when discounted; but we think that as the bank notes were not mixed with the rest of the bankrupt's property, and are capable of being distinctly traced, they stand in the same position as the bills themselves, and, therefore, can not be recovered."

Gladstone v. Hadwen, 1 Maule & Selw., 517.

[*415] *In the case last cited, the bills of exchange, like the *Massillon* bank notes in the case before us, had been obtained from the owner by a fraud; and the property in the bills, therefore, was not vested in the fraudulent holder. One of those bills, like the *Massillon* bank notes, had been exchanged for bank notes. And the Court decided, that not only the remaining bills of exchange, but the bank notes also which had been received for one of the bills, were the property of the original owner of the bills.

There is one other case on this subject to which we must refer. Sir *Thomas Plumer* had the sum of £22,200 in the hands of his *London* bankers, with which he wished to purchase exchequer bills. He accordingly requested a broker by the name of *Walsh*, to buy the bills for him; and, to enable *Walsh* to make the purchase, *Plumer* drew a draft on his bankers, in *Walsh's* favour, for £22,200. *Walsh* took this draft to the bankers, and received the money for it in notes of the Bank of *England*. He then purchased with a part of these

notes exchequer bills for *Plumer* to the amount of £6,500, and lodged them with *Plumer's* bankers. But he determined to defraud *Plumer* out of the residue of the Bank of *England* notes. To effect his fraudulent purpose, *Walsh* purchased, with the remaining bank notes, a certain number of shares in the Bank of the *United States*, a certain amount of three per cent. *United States'* stock, and seventy-one doubloons and a half; and with this property, he attempted to make his escape from *London* to the *United States*. He hastened away in the mail-coach to *Falmouth*; but whilst he was there waiting for the sailing of a packet, *Plumer's* attorney overtook and arrested him. *Walsh* gave up the certificates of stock and the doubloons to the attorney, who delivered the same over to *Plumer*. *Walsh*, in the mean time, having been declared a bankrupt, his assignees, after a demand and refusal, sued *Plumer* in trover for the property. The cause was decided in favour of the defendant, on the ground that although his Bank of *England* notes had been exchanged by *Walsh* into the securities for stock and the doubloons, still the defendant had a right to follow his property into the new form into which it had been converted.

In delivering the opinion of the Court in this case, Lord *Ellenborough* said, that it made no difference into [*416] what other *form, different from the original, the change of the property had been made; for the product of, or substitute for, the original thing, still follows the nature of the thing itself, as long as it can be ascertained to be such; and the right only ceases when the means of ascertainment fail; which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case, continues the Judge, is a difficulty of fact and not of law, and the *dictum* that money has no earmark must be understood in the same way; that is, as predicated only of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money, guineas or other coin marked (if the fact were so), for the

Coffin v. Anderson.

purpose of being distinguished, are so far earmarked as to fall within the rule on this subject, which applies to every other description of personal property, whilst it remains (as the property in question did), in the hands of the factor, or his general legal representatives. *Taylor v. Plumer*, 3 Maule & Selw., 562.

These last two cases are as much opposed to the instruction in question, as the others to which we have referred. It will hardly be said that the doubloons, mentioned in *Taylor v. Plumer*, could not be called money with as much propriety as bank notes, or that they could be more easily identified. It may be also observed that a late *English* writer, in reference to stolen goods, says, that "if the goods be not restored upon conviction, the owner may maintain trover for them. Even where they are not the identical goods, but the produce of them, the action will lie." Morton on Vend., 172. The writer cites several cases in support of this doctrine, and we consider it to be correct. It is similar, in principle, to the doctrine recognized by the cases which we have just been examining. It appears to us, without looking any further into this subject, that there can be no doubt but that the Circuit Court, in this instruction respecting the *Massillon* bank notes connected with the cause, has committed an error.

We have now, we believe, noticed the various objections made by the plaintiff in error to the proceedings exhibited by this record. The judgment must be reversed and a *venire de novo* awarded.

[*417] **Per Curiam*.—The judgment is reversed, and the proceedings subsequent to the issue on the plea of not guilty set aside, with costs. Cause remanded, &c.

C. H. Test, J. Perry, C. B. Smith, M. M. Ray and J. B. Ray, for the plaintiff.

J. Rariden and J. S. Newman, for the defendant

FOSDICK v. STARBUCK, in Error.

THE assignee of a promissory note, given without consideration, may sue the assignor at any time, and without having previously sued the maker. *Howell v. Wilson*, 2 Blackf., 418.

The maker of a promissory note is a competent witness for the plaintiff, in an action by the assignee against the assignor, involving the validity of the consideration of the note.

The statute requiring an oath to a plea, replication, &c., denying the execution of an instrument of writing, &c., does not dispense with the production of the instrument on the trial; it only excuses proof of the execution of the instrument, when such plea, &c., is without oath. See 14 Ind. 389; 11 Id., 148.

ANDERSON and Another, v. MILLER.

CERTIFICATE OF JUSTICE OF THE PEACE.—A justice of the peace with whom the docket of a former justice is legally deposited, may give certified copies from such docket; but the certificate must show that the justice making it has the legal custody of the docket.

JUDGMENT WITHOUT NOTICE TO DEFENDANT.—A judgment of a justice against a defendant is a nullity, unless the defendant had actual or constructive notice of the suit, or appeared to it.(a)

ERROR to the *Perry* Circuit Court.

DEWEY, J.—*Miller* sued *Anderson* and *Hall*, before a justice of the peace, in trespass for taking and carrying away his horse, and obtained judgment. The defendants appealed to the Circuit Court, where the plaintiff also had judgment in his favour on the verdict of a jury.

[*418] *The facts stated in the cause of action are as follows: *Hall* and one *Ricks* obtained a judgment

(a) *Buchanan v. Post*, 5 Ind., 264; *Allen v. Chadsey*, 1 Id., 399; 5 Blackf., 223.

before a justice of the peace against one *Sampley*. Execution issued upon it and was placed in the hands of *Anderson*, who was a constable, to be by him served; he levied the execution upon the horse in question. *Miller* claimed to be the owner of the horse, and had triers summoned to try the right of property before one *Huckeby*, a justice of the peace. The triers found the horse to be the property of *Miller*, and the justice rendered judgment accordingly. *Anderson*, however, proceeded to sell the horse on execution, and this is the cause of action alleged against *Anderson* and *Hall*, the latter instigating the sale.

On the trial in the Circuit Court, *Miller*, for the purpose of establishing his right to the horse, offered in evidence a paper which purported to be the transcript of the proceedings before *Huckeby* on the trial of the right of property. This document had no other authentication than a certificate under the hand and seal of *Josiah Anderson*, a justice of the peace, in these words: "I certify this to be a true copy of the proceedings had before *J. B. Huckeby*, late a justice of the peace for *Tobin township*." The defendants' objection to this testimony was overruled.

We think the Circuit Court erred in admitting this evidence. The authentication was not sufficient. By a statute of 1834, when the docket of a former justice of the peace is legally placed in the hands of his successor in office, or of any other justice, copies certified under the seal of the justice having possession of the original, provided the certificate show that the proceedings and judgments so copied are legally in his possession as such successor or otherwise, are made legal evidence in the Courts of this State. The certificate of *Anderson* neither shows that he was the successor of *Huckeby*, nor that he had in any manner whatever the legal custody of the original, a copy of which he attempted to authenticate. Without showing in his certificate that, as the successor of *Huckeby* or otherwise, he held the legal custody of his judgments and proceedings, the certificate is entirely invalid as evidence.

An attempt is made, in behalf of the defendant in error, to

obviate this difficulty, by urging that the record shows that *Josiah Anderson* was a justice of the county in which the cause was tried, and that as the clerk is bound by [*419] law to *register the names of justices, time of induction, &c., in a book to be by him kept for that purpose, the Court was officially bound to know that *Anderson* was the successor of *Huckeby*. Were it granted that the Circuit Court was obliged to know judicially all the justices of the peace in the county, and the regular order of their succession, it would by no means follow, that it did or could know into whose hands had passed the legal or actual keeping of the docket of a justice, whose official character had terminated. The knowledge of this fact alone could supply the defect of the certificate, if it could be supplied by extrinsic testimony. But it is not conceded, that the Circuit Court was presumed to know the contents of the register kept by the clerk. It is no part of the records of the Court; and if it were, the Court could not act upon it unless it were referred to by a party wishing to avail himself of it. Records of Courts are not laws.

There is another fatal objection to the admissibility of the testimony which was given to the jury, and that is, that the instrument, which purported to be the transcript of the trial of the right of property before *Huckeby*, showed an *ex parte* proceeding. It did not appear that the plaintiff in the execution, on which the horse was seized, had any notice, actual or constructive, of the claim of *Miller*, or of the trial by the triers. A judgment of a justice of the peace rendered against a party who had no notice, implied or positive, of any action pending against him, and who made no appearance, is a nullity; to give it the force of evidence is unauthorized by law, and would be against the plainest dictates of justice. We do not say that if, in the present case, process was really served on the parties, or they appeared at the trial without it, and *Huckeby* omitted to enter the one or the other on his docket, *Miller* could not have supplied the defect by evidence *aliunde*, nor that he can not yet do so.

Wiley, on the relation, &c., v. Shank and Another, in Error.

Per Curiam.—The judgment is reversed, and the verdict set aside with costs. Cause remanded, &c.

J. A. Brackenridge, for the plaintiffs.

S. C. Stevens and *J. R. E. Goodlet* for the defendant.

[*420] *BARBEE v. INMAN, in Chancery.

A CONVEYANCE of real estate was, by the contract of the parties, to be executed on payment of the purchase-money; and the money was to be paid *on or before the first of May, 1834*. The money was tendered, and the deed demanded, *on the 29th of April, 1834*. *Held*, that the tender and demand were valid.

If the vendor in such case, having by the contract the right to designate the point, between two given points, for the beginning corner of the tract, refuse, when properly applied to, to exercise that right, the point may be designated by the vendee. See 14 Ind., 12; 5 Id., 517.

WILEY, on the Relation, &c., v. SHANK and Another,
in Error.

A CONTRACT by which two persons by name, describing themselves as trustees of a certain school district, agree that the "trustees" shall pay a teacher a certain sum for his services, and which is executed by those persons in their own names, is binding upon them individually.

In a justice's Court, an article of agreement between the parties, containing conditions precedent to be performed by the plaintiff, may be filed as the cause of action, without an averment of performance of the conditions. See 5 Blackf., 339.

 Foley and Another v. Knight.

FOLEY and Another v. KNIGHT.

RIGHT OF PROPERTY—EVIDENCE.—On a trial of the right of property taken in execution, the debtor's possession of the goods after his executing an absolute bill of sale of them to the claimant, may be shown, by parol evidence, not to be fraudulent.

ERROR to the *Henry* Circuit Court. The judgment of the Circuit Court was for *Knight*, the claimant.

DEWEY, J.—This was a trial of the right of property seized by execution. The claimant gave in evidence an [*421] absolute bill of sale from the defendant in execution, by which it appeared that the latter had bargained, sold, and delivered to him the property in question. He was then suffered to prove by parol what was the consideration of the sale, and to explain the subsequent possession of the property by the vendor, with a view to rebut the presumption of fraud arising from that circumstance.

The admission of the parol testimony was objected to; and it is now contended that the Circuit Court erred in admitting it, on the ground that it contradicted the bill of sale. Had it really done so, the testimony would certainly have been illegal; but we do not perceive that it had that effect. If parol testimony had been introduced to prove that the understanding or agreement of the parties, as a part of the contract of sale, was, that the vendor should retain possession of the property, it would have been inadmissible. Such, however, does not appear to have been its design or effect; its tendency was merely to show that the subsequent possession of the seller was not fraudulent; and, in this point of view, it comes directly within the decisions of this Court in the cases of *Hankins et al. v. Ingols*, and *Watson et al. v. Williams et al.*, decided at the *May* term, 1835. In those cases such testimony was held to be legal.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

J. Rariden and *J. S. Newman*, for the plaintiffs.

C. B. Smith and *D. Macy*, for the defendant.

ELLIOTT and Another, Administrators, v. ARMSTRONG.

CHANCERY JURISDICTION.—A suit in chancery lies for an account of *mesne* profits after a recovery in ejectment, if the bill claims a discovery and shows a right to it.

OCCUPYING CLAIMANT.—If the occupant of land evicted by a better title be entitled, under the occupying claimant law, to a compensation for his improvements, he is only liable for the rents and profits of the land without the improvements.

APPEAL from the *Dearborn* Circuit Court.

BLACKFORD, J.—*Samuel Elliott* filed a bill in chancery in the *Dearborn* Circuit Court against *Walter Armstrong*.

[*422] *The bill states that in 1804 or 1805, the complainant purchased lot numbered 171, in the town of *Lawrenceburgh*, from the proprietor of the town, took possession of the lot, and made some improvements on it, and, in 1812, received a deed for the lot from the proprietor; that afterwards, in 1812, during the complainant's absence from the country, the defendant, knowing the complainant to be the owner of the lot, took possession of it, and commenced making improvements on it; but that before any improvements of much value were made, the complainant's agent informed the defendant that the lot was the complainant's, and that he ought not to make the improvements; that, in 1819, the complainant commenced an action of ejectment against the defendant, in the *Dearborn* Circuit Court, and, in 1821, recovered a judgment in the suit for the premises in question; and that the defendant, afterwards, filed a bill in chancery against the complainant, claiming an equitable title to the lot, but that his bill was dismissed.

The bill further states that, since 1812, the defendant has been in possession of the lot, and has received the rents and profits; that the defendant claims a large amount for improvements made by him on the lot; that the complainant can not obtain possession until the accounts between the parties for the rents and profits and improvements are settled; and that proof

of the amount of the rents received by the defendant can be obtained only by his own answer.

The bill prays that the defendant may answer the allegations of the bill; that an account may be taken of the value of the improvements and of the rents and profits; and that after deducting the value of the improvements from the amount of rents and profits, the complainant may have a decree for the balance, and be permitted to issue an *habere facias possessionem* on his judgment in ejectment.

The defendant answers as follows: That one *Jacob Horner*, for a valuable consideration, bought the lot of the proprietor of the town; that the defendant, in 1816, bought it from *Horner*, and received a deed for it from him, believing *Horner* to be the *bona fide* owner of the lot; that the defendant, previously to 1819, erected large and valuable buildings on the lot, supposing it to be his, without any notice of the complainant's claim, and has, since 1818, paid large sums [*423] for taxes *on the lot, and received the rents, which rents, on an average, have not exceeded \$153 a year; and that the judgment in ejectment and proceedings in chancery relative to the lot, are as stated in the bill.

To this answer the complainant filed a general replication.

At this stage of the cause, a jury, impaneled on the defendant's motion for the purpose, made the following assessment: that the value of the lasting and valuable improvements made on the lot by the defendant before the first of *October*, 1819, when he received notice of the adverse claim, is \$2,000; that the lot has sustained no damage by waste or cultivation; and that the value of the lot, at the time of the judgment in ejectment, without the improvements, was \$500. This assessment being thus returned, the complainant made his election to pay for the improvements as assessed by the jury. The complainant then filed a supplemental bill, alleging the assessment of the jury and his election to pay for the improvements, and praying that an account might be taken of the rents and profits, &c. This supplemental bill was answered, and the answer replied to. On the suggestion of the complainant's

death, the suit was revived in the name of his administrators; and the cause was then submitted on the bill, answer, exhibits, and depositions.

The Circuit Court dismissed the bill at the complainants' costs.

We think that the Court, in dismissing this bill, committed an error.

The defendant contends, that a court of chancery has no jurisdiction of the subject-matter of the suit; but in this he is mistaken. The bill claims a discovery and shows a right to it; and, when that is the case, it is settled that the court of chancery, where the claim is for an account of rents and profits, may finally settle the whole merits of the cause. Jeremy's Eq. 506.

The defendant also contends, that the suit for *mesne* profits will not lie until the improvements are paid for. It is a sufficient answer to this objection, without looking any further, to observe that, at the time this bill was filed, it does not appear that the defendant had suggested that he had any demand for improvements, or that he had attempted to have their value assessed.

[*424] *In looking into the merits of this suit, we find that the complainants have a just claim to a considerable amount for rents and profits; and that the value of the improvements has been assessed by a jury at \$2,000. It appears to us, that the only real matter in controversy between the parties, is as to the rule by which the amount of the rents and profits is to be estimated. The defendant has had the use of the complainants' lot, and is bound to pay a fair rent for it; but he is entitled to the use of the buildings free of rent, because they were erected at his own expense, and because he has by the statute a right to their possession, until he is paid for them by the complainants. With this view of the subject, we have examined the testimony in the cause, and have come to the following conclusion: The decree of the Circuit Court dismissing the bill must be reversed. The complainants must be charged with the sum of \$2,000, that being the value

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of the improvements as assessed by the jury; and they must be credited with the sum of \$800 for the rents and profits. This amount of the rents and profits is fixed at what we consider to be the value of the rent for the lot, without the improvements, under the circumstances of the case, from the commencement of the action of ejectment until the rendition of this decree. A balance will thus be left in favour of the defendant of \$1,200.

SULLIVAN, J., having been concerned as counsel in the cause, was absent.

Per Curiam.—The decree of the Circuit Court is reversed.

It is decreed that the complainants, upon their payment to the defendant of \$1,200 without interest, within twelve months from this day, have the possession of the premises, when the said money shall be so paid. It is also decreed, that the defendant pay the complainants their costs in this Court.

G. H. Dunn, D. J. Caswell, E. W. Chester, and C. H. Test, for the appellants.

S. C. Stevens, for the appellee.

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*CASE v. WINSHIP.

CHATTEL MORTGAGE—POSSESSION OF GOODS.—The mortgagee of goods (the mortgage being silent on the subject) is entitled to their immediate possession.

SAME—PAROL EVIDENCE.—Parol evidence is not admissible to show that it was the understanding of the parties to such mortgage, at the time of its execution, that the mortgagor should retain possession of the goods until forfeiture.

ERROR to the *Franklin* Circuit Court.

SULLIVAN J.—This is an action of replevin. The declaration charges the defendant, *Case*, with taking and unlawfully detaining certain goods and chattels, the property of the plaintiff. The defendant pleads property in himself. Replication and issue. The cause was tried by a jury, who found

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a verdict for the plaintiff, on which judgment was rendered by the Court.

It appears from a bill of exceptions filed in the cause, that the defendant below and one *Henry Case* were indebted to the plaintiff in three several notes of hand, for \$50.14 each, payable in six, twelve and eighteen months, dated the 7th of *September*, 1836; and that on the 21st of *September*, the defendant and *H. Case* did, by their certain deed, bargain and sell to the plaintiff below the goods and chattels named and described in the plaintiff's declaration, to have and to hold the same to said *Winship*, his heirs and assigns forever. To this grant there was a condition, setting forth that if the grantors, their executors, &c., should well and truly pay to said *Winship* the full amount of the notes, &c., as they should fall due, then the conveyance was to be void. The plaintiff below founded his right to the possession of the property on the above-named mortgage-deed. On the trial in the Circuit Court the defendant offered to prove by parol evidence, that it was the understanding of the parties, at the time of the execution of said instrument, that the property mortgaged should remain in the possession of the defendant until forfeiture, but the Court would not permit the testimony to be given, to which opinion of the Court the defendant excepted, &c.

The plaintiff in error insists, 1st, that the mortgagee is not entitled to the possession of the property until after forfeiture; and 2d, that the Circuit Court erred in not admitting parol testimony to explain the understanding of the parties at the time of the execution of the mortgage.

[*426] *It has been repeatedly decided by the Courts, that if a man makes an absolute sale of goods, and continues in possession of them as visible owner, with the consent of the buyer, the sale is *prima facie* fraudulent as to creditors. The case of a mortgage of goods forms no exception to the general rule. A reason why possession must accompany and follow the deed is, that retaining the property by the vendor enables him to impose upon mankind by false appearances. This reason applies with as much force to a mortgage of goods

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when possession is not delivered, as it does to an absolute sale. In *Ryall v. Rowles*, 1 Ves. Sen., 348, S. C., 1 Atk. Rep., 170, it is held that a pawn is not complete until delivery; but that on a conditional or absolute sale, the sale is complete by the contract, and the party is entitled to a delivery of the goods as soon as he has paid the price. As between the mortgagor and mortgagee a delivery is perhaps not essential to the validity of the mortgage; but this in no wise proves that the mortgagee is not entitled to the possession of the property if he demand it. He acquires, by the mortgage, a special property in the goods, and may detain them for his security. If not redeemed according to the contract, his right becomes absolute. In 2 Kent's Comm., 3d ed., 515, *et seq.*, the author sums up the doctrine on this subject; and the conclusion to be drawn from it is that a vendee in the case of an absolute sale, and a mortgagee in the case of a mortgage, are each entitled to the immediate possession of the property sold or mortgaged.

On the second point made by the plaintiff in error, we conceive the law to be well settled. The Circuit Court did not err in refusing to admit parol testimony to explain the understanding of the parties at the time of making the mortgage. Parol testimony will not be admitted to vary or add to, extend or limit the terms of an agreement in writing. Nothing, says *Ld. Thurlow*, in 4th Bro. C. C., 519, can be added to a written agreement, unless there be a clear, subsequent, independent agreement varying the former; but not where it is matter passing at the same time with the written agreement. Where a written agreement for the sale of goods is silent as to the time of delivery, the law implies a contract to deliver them within a reasonable time, and in such case evidence is inadmissible of a contemporaneous oral contract by the purchaser to take them away immediately. *Greaves v. Ashlin*, 3 *Camp., 426. In *Colman v. Packard*, 16 Mass., 39, the Court decided, that parol evidence was not admissible to prove that, at the time of making the mortgage, it was agreed that the mortgagor should continue in possession until he should fail to perform the condition of the

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mortgage. Numerous cases might be cited illustrating and enforcing this principle, all of which show that the decision of the Circuit Court in this case is correct. It is to be presumed that the parties in expressing their intention, expressed the whole of it; and we can not permit their intention to be changed by the operation of parol testimony.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

J. Ryman, for the plaintiff.

G. Holland, for the defendant.

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PLEADING.—A plea professing to answer the whole declaration, but only answering a part, is bad on general demurrer.

SAME ADMINISTRATOR DE BONIS NON.—In a suit by an administrator *de bonis non* against a debtor of the original intestate, the declaration must state the name of the previous administrator, and aver that the money had not been paid him, nor to the original intestate, nor to the plaintiff.

ERROR to the *Jackson* Probate Court.

SULLIVAN, J.—Debt by *Griffith*, administrator *de bonis non* of *M. G. C. Wood*, against *Fischli*, on two records of judgment rendered by a justice of the peace against *Fischli*. After setting out the records, the declaration avers, “that on the — day of — in the year — at said county, the said *Wood* died intestate, leaving estate whereof administration *de bonis non*, afterwards, to wit, on the — day of — at said county, was granted to the said *Griffith*, &c. Nevertheless the said *Fischli* did not, &c., but hitherto has wholly failed, neglected, and refused, to pay the said several sums of money either to the said *Wood* in his life-time, or to the said *Griffith*, administrator as aforesaid, at any time since, &c.”

The defendant filed a plea professing to answer the whole *declaration, but leaving unanswered a material part of it. The plaintiff replied to the plea, and

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the defendant demurred to the replication. Issue having been made on the demurrer, the Court decided that the demurrer to the replication was well taken, and final judgment was rendered against the plaintiff.

It is not now necessary to determine whether the replication be good or bad. The plea, because in its commencement it professes to answer more than it afterwards answers, and leaves a material part of the declaration unanswered, is defective. 1. Ch. Plead., 509, 510; 6 Johns., 63; 1 Blackf., 99. The demurrer, however, requires us to look into all the pleadings filed in the cause, and to give judgment against the party whose pleading was first defective in substance.

The declaration in this record is substantially defective. The plaintiff sues as administrator *de bonis non*. An administrator *de bonis non* is one to whom administration afresh of the goods of a deceased person, not administered by a former executor or administrator, has been committed. The declaration omits to state who the executor or administrator of Wood was, to whom the present plaintiff is successor, and omits to aver that the defendant did not pay the amount sued for, nor any part thereof, to said executor or administrator. It avers that the defendant did not pay the sums of money sued for, either to said Wood in his life-time, or to said Griffith at any time since. This may be true, and yet the defendant may have paid the debt to a person authorized by law to receive it, that is, to the predecessor of Griffith in the administration of Wood's estate.

The total omission of a breach, or the defective statement of it, so that thereby the contract does not appear to have been broken, is bad on general demurrer. It would, it seems, be bad after verdict. *Vide* Hobart, 198, 233; 1 Sid., 440. *Lunn v. Payne* 6 Taunt., 140; *Sicklemore v. Thissleton*, 6 Maule & Selw., 9; 7 Prince, 550.

Per Curiam.—The judgment is affirmed. To be certified, &c.

A. C. Griffith, for the plaintiff.

H. P. Thornton, for the defendant.

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JUDGMENT—ACTION ON CONSIDERATION.—The want or failure of consideration is no defense to an action of debt on a judgment rendered in this State by a justice of the peace. (a)

APPEAL from the *Scott* Circuit Court. The demurrers to the special pleas in this case were overruled by the Court below, and a judgment was there rendered for the defendant.

SULLIVAN, J.—This is an action of debt founded upon the record of a judgment of a justice of the peace of *Scott* county. To the declaration the defendant pleaded, 1st, *nil debet*, on which the plaintiff joined issue; 2d, that the judgment obtained by the plaintiff against the defendant before the justice of the peace, was obtained by fraud, &c., in this, that the plaintiff agreed with the defendant that, in consideration that he the defendant would confess said judgment, he the plaintiff as executor, &c., would assign to the defendant a certain judgment on the docket of one *Arthur Watts*, a justice of the peace, against *Nathan Baker*, which judgment though often requested he had not assigned, but fraudulently, &c., had failed so to do. The third plea avers in general terms, that the consideration for which the judgment was confessed has wholly failed; and the fourth plea is, that the judgment was confessed without any consideration whatever. To the second, third and fourth pleas the plaintiff demurred. The second plea is called by the defendant a plea of fraud, but we regard it as a plea of failure of consideration. It differs from the third plea only in this, that it contains certain special averments setting forth the consideration on which the judgment below was confessed, and how that consideration has failed, all of which are omitted in the third plea.

The principal question for us now to decide is, whether in an action of debt on a judgment between the same parties, the *consideration on which the judgment was obtained can be inquired into by plea.

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Debts of record being sanctioned in their creation by a Court of competent jurisdiction, have certain particular properties which distinguish them from all other kinds of debts. One of these properties is, that they can not in general by pleading be impeached, or affected by any supposed defect or irregularity in the transaction on which they are founded. Anciently, it was a settled rule and maxim of the law that nothing should be averred against a record, nor should any plea or even proof be admitted to the contrary. At the present day this rule is subject to some exceptions; as where the defendant in the original action had not notice of the suit; or where the court had not jurisdiction of the person, or of the subject-matter in controversy. So, where a judgment has been signed upon a warrant of an attorney given upon an unlawful consideration, or obtained by fraud, the Court will afford relief upon a summary application. See *Cole v. Driskell*, 1 Blackf. Rep. 16; *Holt v. Alloway*, 2 ib., 108; 7 Petersd., 521; Doug., 196; Cowp., 727. The rule, however, is not so far relaxed, as to authorize a defendant to avoid a judgment entered by a court of competent authority on his own confession, on the ground that he confessed it without consideration, or that the consideration has failed. To what extent a court of equity would afford relief in such cases, is not for us at this time to decide. It is sufficient now to say, that a party to such a judgment as is set forth in the declaration in the present case, is estopped at law from inquiring by plea into the regularity of the judgment, or impeaching the consideration on which it was founded. Till a judgment rendered by a court of competent jurisdiction is set aside or reversed, it is conclusive between the parties, as to the subject-matter of it, to all intents and purposes. *French v. Shotwell*, 5 J. C. R., 555; S. C. 6 id., 235, and the authorities there cited. Third persons may show, that a judgment by which their interests are affected was fraudulent and covinous, for strangers ought not to be bound by such a proceeding; but it is a general rule that a person who was a party to the proceeding, or who might have been a party to it, can not show fraud or want of considera-

tion in the subject-matter of it, in order to repel the judgment.

1 Stark. on Ev., 252, 3, 4. These remarks are not
 [*431] intended to *apply to a case where the judgment has
 been procured by misrepresentation and falsehood.
 In such cases, properly made, a court of law is competent to
 afford relief.

It is to be further noticed in this case, that the judgment attempted to be impeached is a judgment by confession. The Court acted upon the consent of the parties, and if such a judgment is not conclusive between the parties to it, there will be no end to litigation. He who confesses a judgment, says Chancellor *Kent*, in *French v. Shotwell*, or suffers it to pass by default, is concluded from defense, according to the general language of the cases.

The defendant, however, contends, that notwithstanding the pleas may be defective, the plaintiff ought not to have judgment, because he sued and obtained judgment before the justice of the peace in his character of executor, and therefore the justice had not jurisdiction of the cause. If the plaintiff sued on a contract made with the testator, the justice of the peace had not jurisdiction of the case, because he sued in another's right, but he may have recovered, and we presume did recover, before the justice in his own right, and on a contract made with himself. If so, this case is not within the reason of the decision in the case of *Simonds v. Colvert*. On the contrary, the jurisdiction of the justice extended to the case, and he had competent power and authority to determine it.(1)

It is also contended by the defendant's counsel, that the plaintiff's declaration is defective, because it does not aver that the justice of the peace, on whose transcript this suit was brought, had jurisdiction of the case. It is true there is no distinct averment, in the usual form, that the justice had jurisdiction of the case, but the declaration sufficiently shows that the case, as to person, amount, and subject-matter, was within his jurisdiction, which is sufficient on general demurrer.

Dougherty v. Mason, in Error.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the first plea set aside, with costs. Cause remanded, &c.

S. C. Stevens and *M. G. Bright*, for the plaintiff.

J. G. Marshall and *C. H. Test*, for the defendant.

(1) *Vide* note to *Simonds v. Colvert*, Vol. 2 of these Rep., 413; Rev. Stat., 1838, p. 364, 5.

[*432] *GRAY v. WOODS, in Error.

EQUITY relieves against mistakes, as well as against fraud, in a deed or other written contract; and parol evidence is admissible to prove the mistake, though it be denied in the answer. *Gillespie et ux. v. Moon*, 2 Johns. C. R., 585. But equity will not interpose in such case, unless there be the clearest and most satisfactory proof of the mistake and of the agreement between the parties. *Lyman v. The United Ins. Co., Id.*, 630.

The notice to a purchaser of a previous unrecorded conveyance for the land is not binding, unless it be given by a person interested in the property, and in the course of the treaty for the purchase. A purchaser will not be bound by notice in a previous transaction which he may have forgotten. Sugd. on Vend., 490; See 9 Ind., 126.

DOUGHERTY v. MASON, in Error.

IF the papers in an appeal from the judgment of a justice be not filed in time, the appellee may, for that reason, have the appeal dismissed on motion; but if, without making

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the objection, he go to trial on the merits, the objection is waived.(1)

The circumstance, that on a trial of a cause before a *A B*, a justice, without a jury, the justice was, with consent of parties, assisted by *C D*, another justice, who sat and consulted with him on the trial, is no objection to the judgment pronounced in the cause by *A B*.

(1)The justice's failure to file the papers in time is not now a cause for dismissing the appeal. Stat., 1839, p. 87.

[*433] *DOUGHTON v. TILLAY and Others.

PLEADINGS IN OTHER CASES AS EVIDENCE.—A paper purporting to be an answer to a bill of discovery, and to have been sworn to before a magistrate in *Kentucky*, was offered in evidence in a suit at law. *Held*, that to render the paper admissible evidence as an answer, there should be proof of its having been filed as such, of the signature of the party to it, and of the officer to the attestation. *Held*, also, that to its admission as a voluntary affidavit, proof of the party's signature and of its having been legally sworn to, was necessary; and that as a written acknowledgment of the party, proof of his signature was necessary to its admission.(a)

ADMISSIONS OF PARTNER.—*Quære*, whether the admissions of one partner, made after the dissolution of the partnership, are admissible evidence against the firm?(b)

APPEAL from the *Floyd* Circuit Court.

BLACKFORD, J.—*Tillay* and others, as partners, brought an action of assumpsit against *Doughton* on a promissory note. The defendant pleaded the general issue. The cause was submitted to the Court, and a judgment rendered for the plaintiffs.

After the plaintiffs had closed their testimony, the defendant read a bill of discovery which had been filed by him against the plaintiffs, and then offered to read as evidence a paper

(a)See *Johnson v. Prather*, 5 Blackf., 411; *Draper v. Williams*, 8 Id., 574; *Wright v. Bundy*, 11 Ind., 398.

(b)See *Dickerson v. Tucker*, 12 Ind., 223.

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containing an admission that the note sued on was paid, and purporting to be the answer of *Tillay*, one of the plaintiffs, to the bill of discovery. The admission of this paper as evidence was objected to, and the objection sustained. The bill of discovery is not made a part of the record, but the paper purporting to be an answer to it is before us. This paper has the name of *Tillay* attached to it, and is certified by a person styling himself a justice of the peace in the State of *Kentucky*, as having been sworn to before him. The record shows that the admission contained in the paper offered in evidence, was made after the dissolution of the partnership of the plaintiff.

There is but one error assigned; and that is, that the Court erred in not permitting the paper in question to be read as evidence.

It is said that the paper purported to be an answer to a bill of discovery, and that as such it was offered. It is not usual, in civil cases, to introduce the original answer. When an answer in chancery is proposed to be read as evidence in such case, the ordinary mode is to procure from the proper office examined copies of the bill and answer. *Roscoe on Ev.*, 57.

It is only in criminal cases, and cases partaking of [*434] that *character, that the original answer is required.

Lady Dartmouth v. Roberts, 16 East, 334. And when the original is offered, the signature of the party to the answer, and of the proper officer to the attestation, must be proved. *Rex v. Benson*, 2 Camp., 508. There could be no objection, however, to the paper before us, merely because it was offered as the original answer instead of a copy. But when it was offered as an original as this was, the defendant should have proved it to be entitled to the character he gave it. There was not, however, in this case, any proof that the instrument had been filed in chancery, in the course of judicial proceedings, as an answer to a bill of discovery or to any other bill; nor, had there been such proof, was there any attempt to introduce the additional evidence which is necessary in such cases.

It may be contended that the instrument was at all events legal evidence, either as a voluntary affidavit, or at least as the

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written admission of the party who signed it. To make it admissible as a voluntary affidavit, the signature to it of *Tillay* should have been proved, and there should have been proof, also, that it had been sworn to before the proper officer. 2 Bac. Abr., 623. But there was no evidence offered as to either of those requisites. The signature to the *jurat* was not proved; but if it had been, still the *jurat* would have been no evidence of *Tillay's* signature to the paper, or that the officer who signed the *jurat* in *Kentucky* was authorized to administer an oath. To make the instrument evidence as a mere acknowledgment in writing, there should have been proof that *Tillay* had signed it; but there was no such evidence.

It is clear, therefore, that as there was no proof whatever of the paper proposed to be read, the Court did right in rejecting it.

There is another objection made to the admission of this evidence; which is, that the acknowledgment of payment contained in the paper, was not made until after the partnership of the plaintiffs was dissolved. This objection is not without difficulty, and there are contradictory decisions respecting it. It is believed to be settled in *England*, that the admissions of one of the partners made after the dissolution, as to transactions which occurred during the partnership, are admissible evidence against the other partner. *Wood v. Braddick*, 1 *Taunt., 104. Indeed, there is a late case which goes further, and decides that though the admission of one of the partners be not only made after the dissolution, but be of a payment which was made to him after the dissolution, the evidence may be received to bind the other partner. This is a decision in chancery made by Lord *Brougham*, with the concurrence of the Chief Justice of another Court. *Pritchard v. Draper*, 1 Russ., & Mylne, 191. In *Massachusetts*, the case above cited of *Wood v. Braddick* is decided to be the law. *Cady v. Shepherd*, 11 Pick., 400. But in *Yew York*, the law is held to be otherwise. *Walden v. Sherburne*, 15 Johns., 409; *Baker v. Stackpoole*, 9 Cowen, 420. And Judge *Story*, in delivering the opinion of the

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Supreme Court of the *United States* in *Bell v. Morrison*, 1 Peters, 373, takes occasion to say, that the doctrine on the subject in *New York* is well founded. In the case before us, this question has been discussed by the counsel on both sides, but its determination is not now necessary, and we shall not therefore undertake to decide it.

DEWEY, J., having been concerned as counsel was absent.

Per Curiam.—The judgment is affirmed with 1 *per cent.* damages and costs. To be certified, &c.

S. C. Stevens, for the appellant.

R. Crawford, for the appellees.

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ESTOPPEL.—When a party makes admissions in the condition of a writing obligatory, he is estopped from denying, in a suit on the obligation, the facts thus admitted.

SAME.—If the declaration show that the defendant is estopped to plead the facts contained in his plea, the plaintiff need not reply the estoppel but may demur.(a)

VARIANCE.—The declaration averred the suit to be “on the relation of *Susanna H.*” to the plaintiff’s damage “for the use of *Susan H.*” Breach, non-payment “to the said *Susan H.*” Held, that there was no variance.

PLEADING.—To debt on bond, *nil debet* is a bad plea on general demurrer.(b)

ERROR to the *Delaware* Circuit Court. The plaintiffs in error were the defendants below; and the demurrers to the pleas were general.

SULLIVAN, J.—This is an action of debt on a bastardy bond. The condition of the bond recites, that *I. W.* [*436] *Trimble*, one of *the defendants in the Court below, was, at the *April* term of the *Delaware* Circuit Court, in the year 1832, arraigned to answer the state of *Indiana*, on the complaint of *Susanna Hobough*, on a charge of bastardy;

(a) *French v. Blanchard*, 16 Ind., 143; 7 Id., 600; 3 Id., 449; 1 Id., 434.

(b) *Eakle v. Oliver*, 5 Blackf., 3; 27 Ind., 508.

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that at the said term, *Trimble* having pleaded not guilty, was found guilty by a jury impaneled to try the issue, and was adjudged to be the father of the child; that the Court thereupon entered judgment on the verdict, and ordered *Trimble* to pay to said *Susanna* the sum of ten dollars in three months from the date of the judgment, and twenty dollars in six months from said date, and to pay the further sum of twenty dollars annually for six years in semi-annual payments, making altogether the sum of \$150. The breach assigned in the declaration is, that on the fourth of *July*, 1832, the sum of ten dollars, and on the fourth of *October*, 1832, the further sum of twenty dollars, became due and payable to the said *Susan Hobough* according to the condition of the bond, but the defendants or either of them have not paid the same, &c.

The defendants craved *oyer* of the bond and condition, and pleaded, 1st, that there is no record of the supposed recovery and adjudication, as is in said bond alleged; 2d, that there is no record of the supposed recovery and adjudication in plaintiff's declaration mentioned, wherefore said writing obligatory was obtained from the defendant without any good or valuable consideration; 3d, that said *I. W. Trimble* was not the father of the supposed bastard child in the condition of said bond specified; 4th, that on, &c., at, &c., the said *Susan Hobough*, by her release in writing sealed with her seal, and which is destroyed by fire and can not be produced here in Court, released the said defendants from all actions accruing to her use on the bond; 5th, *nil debet*. The plaintiff demurred to the first, second, third, and fifth pleas, and, to the fourth plea, replied that the said release was not destroyed by fire in manner and form, &c.

The Court sustained the demurrer to the pleas; and the issue on the fourth plea being submitted to the Court for trial, was decided in favor of the plaintiff. Judgment was thereupon rendered, to reverse which the present writ of error is brought.

The first, second, and third pleas, deny admissions made by the defendants in the condition of the bond, which is the

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[*437] *foundation of the present suit. When a party makes an admission in an instrument under his hand and seal, he is estopped from disputing the facts which it recites. If a condition be to perform the covenants in an indenture, the party can not say there is no such indenture. If a condition be to pay money for which he is bound in a particular obligation, he can not say there is no such obligation. If a condition in a bond recite that a particular suit is depending in the Court of King's Bench, for example, the obligor is estopped from saying there is no such suit there. So, if the condition of a bond be to perform the covenants in a particular indenture, he is estopped from saying there is no such indenture. 1 Ph. Ev., 83; Com. Dig. Ev. B., 5; 1 Stark. Ev., 302. The obligors in an administration-bond are estopped, by the recital in the bond, from denying the appointment of the administrator. 8 Pick. Rep., 386; *see*, also, 3 Id., 38. Numerous other cases might be cited to the same effect. *See*, Com. Dig. "Estoppel," A. 2. But in the language of Judge *Daggett*, in the case of *Stow v. Wyse*, 2 Conn. Rep., 214, "without multiplying authorities upon a point rendered clear by numerous cases, it is sufficient to state, that where a party has solemnly admitted a fact by deed under his hand and seal, he is estopped not only from disputing the deed itself, but every fact which it recites." Tested by the principle laid down in the foregoing cases, the first, second and third pleas in this record can not be sustained. They all deny facts which the defendant has distinctly admitted in the condition of his bond.

When the declaration sets forth the bond and condition, and the matter of estoppel appears upon its face, the plaintiff need not reply the estoppel, but may demur. 1 Ch. Pl., 575; 1 Saund. Rep., *Veale v. Warner*, 325, note 4. If the matter of estoppel do not appear from the anterior pleadings, the replication should set it forth. *Ibid.*

The plaintiff contends, that there is a variance between the condition of the bond as set out in the declaration, and the bond and condition as set forth on *oyer*, that because the judg-

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ment is rendered for the use of *Susan Hobough*, and the declaration avers it to be for the use of *Susanna Hobough*, it is defective on account of the variance. We do not think the variance material. If two names are taken promiscuously to be the same in common use, though they differ in [*438] sound, there *is no variance. 4 Bac. Abr., "Misnomer." Where two names are derived from the same source, or where one is an abbreviation or corruption of the other, but both are taken by common use to be the same, though differing in sound, the use of one for the other is not a misnomer. *Vide* 7 Am. Com. Law, 51. In the present case, the declaration commences by averring the suit to be "on the relation of *Susanna Hobough*," and closes to the damage of the plaintiff "for the use of *Susan Hobough*;" and the breach in the declaration is for not paying to the said *Susan Hobough*, &c. Both names are promiscuously applied to the relator in the declaration, and we think it good on general demurrer.

As to the fifth plea, there can be no doubt it is bad. The distinction between the cases in which *nil debet* may and may not be pleaded, is clearly laid down in 1 Ch. Pl., 477, 478. Where the deed is only inducement to the action, and matter of fact the foundation of it, the plea is proper; but where the deed is the foundation of the suit and the fact merely inducement, it is no sufficient plea. Thus in debt for a penalty on articles of agreement, *nil debet* is bad. So, in an action on a bail-bond, or on a bond setting out the condition and breach. These are, in principle, analogous to the present case. See *Jones v. Pope*, 1 Saund. Rep., 38, note 3; *Roberts v. Mariett*, 2 Id., 187, note 2.(1)

Per Curiam.—The judgment is affirmed with 5 *per cent.* damages and costs. To be certified, &c.

J. Rariden and *J. S. Newman*, for the plaintiffs.

D. Kilgore, for the defendant.

(1) *Nil debet* to debt on bond is bad on general demurrer; but if the plaintiff, instead of demurring, accept the plea and join issue, the defendant may prove any special matter of defense which might be proved under the same plea in debt on simple contract. Gould's Pl., 310, 311; 1 Chitt. Pl., 518, 552.

Mills v. Barnes.

MILLS v. BARNES.

EVIDENCE OF JUSTICE'S JUDGMENT.—In a suit against a justice for not filing in time the papers in an appeal, the best evidence of the justice's judgment is his record, or a certified copy of it; not a copy, certified by the clerk, of the transcript filed in the Circuit Court.(a)

[*439] ERROR to the *Gibson* Circuit Court.

SULLIVAN, J.—*Barnes* sued one *Harrington* before *Boicourt*, a justice of the peace of *Gibson* county, and recovered a judgment for the sum of \$16.68. *Boicourt* vacated his office, and his docket was duly transferred to *Mills*, the plaintiff in error, as his successor. At the suggestion of *Barnes*, a *scire facias* was issued by *Mills* against *Harrington*, requiring him to appear and show cause why execution should not issue against him; and, on the hearing, judgment was rendered against *Barnes* for the costs. From that judgment *Barnes* appealed. *Mills*, the plaintiff in error, failed to cause a transcript of the judgment and proceedings before him, to be filed with the clerk of the Circuit Court within twenty days after the filing of the appeal-bond by *Barnes*; and the appeal was for that cause, on the motion of *Harrington*, dismissed by the Circuit Court.

For that alleged neglect of duty, *Barnes* sued *Mills* before a justice of the peace, who decided in favour of *Mills*. On appeal to the Circuit Court, *Barnes* obtained judgment; and to reverse that judgment, the present writ of error is brought.

On the trial in the Circuit Court, the plaintiff below, for the purpose of proving the proceedings had before *Mills* on the *scire facias* in favour of *Barnes* against *Harrington*, and that the judgment was appealed by him to the Circuit Court in due time, offered in evidence a copy of the transcript of the justice of the peace in the case of *Barnes* against *Harrington*, on file in the *Gibson* Circuit Court, certified by the clerk of that Court. The defendant objected to the admission of this testimony, but the Court overruled his objection and admitted it.

(a) *Peters v. Land*, 5 Blackf., 12.

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We think the paper introduced was not the best evidence within the reach of *Barnes*. It was necessary that he should prove on the trial in the Court below, amongst other things, that he had a legal demand against *Harrington*, that a suit had been commenced upon it before *Mills*, that final judgment had been rendered, and that he had appealed to the Circuit Court. These facts could be best proved by the record in the possession of *Mills*, or by a transcript from that record certified by the keeper of it, or, after request and refusal to furnish the testimony, by evidence *aliunde*. As no effort was made to procure that testimony, it was not proper for the plaintiff to resort to secondary evidence.

[*440] *The testimony introduced was also objectionable in another point of view. It was the copy of a copy from the justice's docket. A copy of a public document is admitted in evidence as the original, if properly authenticated, but a copy of a copy proves nothing. It is said to be of no weight whatever. *Gilb. Ev.*, 10; 1 *Dall.*, 65. The clerk of the Circuit Court of *Gibson* county, could only certify to the existence of the copy on file in his office, but he could give no transcript from the original, because he had not the custody of the record, and had no knowledge of its existence.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Pitcher, for the plaintiff.

THE STATE, on the Relation, &c., v. ABRAMS.

SURETY OF THE PEACE—COSTS.—Sureties of the peace were obtained before a justice, but the Circuit Court refused to continue the defendant under recognizance. *Held*, that the complainant was not liable for costs.(a)

APPEAL from the *Fayette* Circuit Court.

(a) *State v. Manors*, 16 Ind., 175.

The State, on the Relation, &c., v. Abrams.

SULLIVAN, J.—*William Lair*, the complainant in this case, prayed surety of the peace against *Abrams*, on complaint made before a justice of the peace. The justice required the defendant to enter into recognizance to appear at the next Circuit Court, and in the mean time to keep the peace, &c. The Circuit Court, at the hearing, refused to continue the defendant under recognizance, and ordered him to be discharged, and further ordered the complainant to pay the costs that had accrued in the Circuit Court. From that judgment, the complainant appealed to this Court.

The only error assigned is, that a complainant in a case of this kind is not liable for costs, and that the Court erred in giving judgment against him for the costs in the Circuit Court.

The right of a party to receive costs, and his liability to pay them, are regulated entirely by statute. At common law, no costs were recoverable by the plaintiff or defendant. By the

statute of 6 Ed., 1, costs were directed to be taxed in [*441] favour of *the plaintiff in certain cases, and, since that time, various statutes have been passed prescribing and defining the cases in which they shall be awarded. There are still cases where costs are not taxable in *England*, because the statute authorizing the proceeding does not give costs. Therefore, in awarding costs, the true question is, whether, as no costs were recoverable at common law, there is any statute that expressly or impliedly gives authority to award them?

In *England*, it is a general principle that the King neither pays nor receives costs in any case; and when a prosecuting witness is required to pay costs, as he sometimes is, it is because of some statutory provision.

The case before us is a prosecution in the name of the State, to compel the defendant to keep the peace. The complainant is a witness on the part of the State. The object of the proceeding is to require the defendant to give full assurance to the public, that he will not commit the offense which it is apprehended he intends to commit. The tendency of it is to prevent the commission of crime, and preserve the peace of

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society; and the cognizance of it belongs appropriately to the criminal side of the Court. We have no statute which makes the State or a prosecuting witness liable for costs. The statutes cited by the defendant's counsel (R. C., 1831, p. 402, sec. 14; Stat., 1833, p. 113, sec. 6), do not apply to cases of this kind. By these statutes, relators who use the name of the State in prosecuting civil suits for their individual benefit, shall, if they fail to succeed in their suits, be liable for the costs. In cases such as the one before us, the witness prosecutes as well for the public as for himself, and therefore it is, we may suppose, that the Legislature has not thought proper to make him liable for costs. Litt. Sel. Cas., 107.

We therefore think the Court erred in awarding costs against the complainant; and the judgment as to the costs must be reversed.

Per Curiam.—The judgment as to the costs is reversed, and as to the residue affirmed. To be certified, &c.

C. B. Smith and *S. W. Parker*, for the appellant.

C. H. Test and *J. Perry*, for the appellee.

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*TINGLE v. PULLIUM.

ISSUING OF EXECUTION.—A justice having rendered a judgment for the plaintiff, was directed by him not to issue an execution until the time for taking an appeal had expired. *Held*, that in such case, the justice was not bound to issue an execution until the plaintiff requested it.

ERROR to the *Marion* Circuit Court.

SULLIVAN, J.—*Pullium* sued *Tingle*, who was a justice of the peace, to recover damages of him for neglecting to issue an execution on a judgment, which he (*Pullium*), had obtained before said *Tingle* against one *Duffield*. It appears from the record, that on the 13th of *August*, 1833, a judgment was rendered by *Tingle*, a justice of the peace of *Bartholomew* county, against *Duffield* in favour of *Pullium* for the sum of

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forty-two dollars; that soon after the rendition of said judgment, the attorney of *Pullium* being informed by *Duffield* that he intended to appeal from the judgment, directed the justice of the peace (*Tingle*), not to issue execution until the time for taking such appeal had expired; that *Tingle*, agreeably to his instructions, did not issue execution at that time, and from forgetfulness, or some other cause, did not issue immediately on the expiration of the time for taking an appeal; and that within two or three days after the time for taking an appeal had elapsed, *Duffield* left the county and has not since returned. It further appears that *Duffield*, at all times after the rendition of the judgment, was without property, except a very inconsiderable amount, which was sold on an execution issued on the judgment. The record does not show what amount was made on said execution, nor does it inform us whether the writ has been returned or not.

On this statement of facts, the Circuit Court gave judgment for the plaintiff below.

We think this judgment must be reversed. The forty-fifth section of the act regulating the jurisdiction and duties of justices of the peace, provides that on all judgments rendered by justices of the peace, "the justice, unless otherwise directed by the judgment-creditor, shall issue one execution." A direction by the judgment-creditor, or by his agent, not to issue, until after a certain event shall have happened, [*443] or period of time *elapsed, is a direction not to issue until further orders are given. The happening of the event, the expiration of the period of time on which the execution may issue, &c., are matters with which it would be unreasonable to require the justice of the peace to burthen his mind. He can not be required officially to take notice of them. If the judgment-creditor interferes with the prescribed duties of the officer, or interrupts the regular course of the law, he becomes the manager of his own cause, and can not make others responsible for losses brought upon himself by his own imprudence. In this case we are bound to presume that the justice of the peace would have issued an execution in due

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time, and performed all his duty, if he had not been otherwise directed.

It will not be necessary to enter upon the question, whether the insolvency of *Duffield*, the original judgment-creditor, ought not to have prevailed in the Court below, so as to have reduced the damages to a mere nominal amount. For the reasons above given, the judgment must be reversed at the costs of the defendant in error.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. Fletcher and *O. Butler*, for the plaintiff.

J. Morrison, for the defendant.

SMITH v. SCANTLING.

TROVER—PLEADING.—TROVER. Plea, a former recovery in assumpsit for the non-performance of the same promises mentioned in the declaration. *Held*, that the plea was bad.

EVIDENCE—WRITTEN INSTRUMENT.—If an instrument of writing not set out in the pleadings be offered in evidence, its execution must be proved.

APPEAL from the *Cass* Circuit Court.

SULLIVAN, J.—This was an action of trover brought by *Scantling* against *Smith*, to recover the value of certain goods and chattels claimed by the plaintiff, and converted by the defendant to his use. The defendant pleaded, 1st, not guilty; 2d, that on the 11th of *January*, 1836, the plaintiff, before a justice of the peace of *Cass* county, who then and [*444] there had *jurisdiction, &c., impleaded the defendant in a certain plea of assumpsit, for the not performing “the very same identical promises and undertakings in said declaration mentioned,” and such proceedings were thereupon had, that the defendant, by the consideration and judgment of said justice of the peace, recovered against the plaintiff — dollars for his costs, and charges about his defense laid out, &c. To the second plea the plaintiff demurred, setting out special

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causes, and the defendant joined in demurrer. The Court sustained the demurrer. The cause was tried by a jury on the general issue. The jury found for the plaintiff, and judgment was accordingly rendered by the Court.

During the progress of the trial a bill of exceptions was taken, from which it appears that the defendant below (*Smith*) and one *A. W. Steele*, on the fourth of *April*, 1835, entered into a contract in writing, under seal, by which they agreed to plant and raise a crop of corn and oats on the lands of *Smith*, each party to do and perform certain things therein named, and after harvesting the crop to make a just and equal division between themselves; that on the 16th of *May*, 1835, *Steele*, by an indorsement on the back of said writing, substituted and appointed *James C. Cox* in his place, to do and perform "all and each of the conditions in said articles of agreement" by him to be done and performed, and to receive his portion of the crop, &c.; that on the 27th of *July* following, *Cox* sold to *Scantling* (the plaintiff below), and, by a separate instrument of writing, assigned to him all his interest in the crop so raised or to be raised on the land of *Smith*. To the admission of the agreement between *Smith* and *Steele*, as evidence to the jury, the defendant objected, until its execution should be proved; but the Court overruled the objection and permitted the agreement to be read as evidence to the jury without proof of its execution.

We think the demurrer to the second plea was well sustained by the Court. This is an action of trover, the gist of which is the wrongful conversion of the plaintiff's property. The plea sets up, as a bar to the action, a former recovery in an action of assumpsit for the not performing the same "identical promises and undertakings" in the plaintiff's declaration mentioned. It is obvious that this plea is no answer [*445] to the *declaration; it does not conform to the count, and is for that reason bad on demurrer. 1 Chit. Pl., 507.

We think, however, the Court erred in permitting the agreement between *Smith* and *Steele* to be read to the jury as evi-

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dence, without proof of its execution. It was offered to prove an important and material fact in the cause, that is, property in the plaintiff, and the defendant below had a right to question its genuineness. The execution of an instrument of writing which is the foundation of the plaintiff's action, or of the defendant's defense, and which is set out in the pleadings and not denied under oath, unless that oath be waived by the opposite party, as in the case of *Hagar v. Mounts*, 3 Blackf., 57, need not be proved on the trial. When it is not so set out in the pleadings, but is offered to prove a fact arising in the progress of the cause, its execution must be duly proved.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

I. Naylor, for the appellant.

H. Cooper, for the appellee.

DOE, on the Demise of MAXWELL, v. MOORE.

EVIDENCE—ADMISSIONS.—If the plaintiff's lessor in ejectment claim title to the premises, as a purchaser under a judgment and execution against the defendant's grantee, the grantee's confessions made subsequently to the judgment, tending to invalidate the defendant's deed to him, are inadmissible as evidence for the defendant.(a)

APPEAL from the *Fountain* Circuit Court.

SULLIVAN, J.—This is an action of ejectment brought for the recovery of one hundred and twenty acres of land lying in the county of *Fountain*. Plea, not guilty.

On the trial in the Circuit Court, the plaintiff introduced in evidence a deed from the defendant, *Charles L. Moore*, to *James Maxwell* and *John H. M'Cormick* for the premises named in the plaintiff's declaration, dated the 20th of *August*, 1833, the record of a judgment of the *Fountain* Circuit Court in favour

(a) *Wynne v. Glidewell*, 17 Ind., 446; *Boone Co. Bank v. Wallace*, 18 Id., 82.

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of one *Sawyer* against said *James Maxwell* and *John H. M'Cormick*, rendered at the *March* term, 1834, *for the sum of \$325.50, the execution issued on the judgment, and the levy and sale of the land described in the declaration indorsed thereon; also a deed for the land from the sheriff of *Fountain* county to the lessor of the plaintiff, *James A. Maxwell*, who was the purchaser at the sale, duly acknowledged and dated the 25th of *April*, 1836.

The defendant thereupon offered in evidence an agreement in writing under seal, between *Moore* and *James Maxwell* for himself and said *John H. M'Cormick* by the name and description of *James Maxwell & Co.*, dated the 18th of *March*, 1835, for the purpose of proving, among other things, an acknowledgment by *Maxwell* that the deed from *Moore* to *Maxwell* and *M'Cormick* had not been delivered to them by *Moore*, but was delivered at the time of its execution to one *Bodley* as an escrow; that a settlement of accounts had since taken place between *Moore* and *Maxwell & Co.*, and that the deed was, by agreement between the parties, to be destroyed and considered of no effect. To the introduction of that agreement as evidence, the plaintiff objected, but the Court overruled the objection and permitted the agreement to be read to the jury, to which the plaintiff excepted.

It appeared in evidence that the *James Maxwell* who executed said agreement was another and different person from the lessor of the plaintiff, *James A. Maxwell*; that the firm of *James Maxwell & Co.* was composed of the said *James Maxwell* and *John H. M'Cormick*; and it further appeared that said *M'Cormick* was not present when *Maxwell* and *Moore* entered into the agreement, nor was there any proof that *M'Cormick* authorized *Maxwell* to make it.

The jury on the foregoing testimony returned a verdict for the defendant, on which the Court entered judgment. From that judgment the plaintiff has appealed to this Court.

The instrument of writing, offered in evidence by the defendants to prove that the deed from *Moore* to *Maxwell* and *M'Cormick* had been delivered to *Bodley* as an escrow, was

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entered into on the 11th of *March*, 1835, about one year after the rendition of the judgment against *Maxwell* and *M' Cormick* on which the land was sold. That judgment was a lien on the real estate of the defendants, and the effect of the declaration of *Maxwell*, and it may be the design of it, was to destroy that lien. This we think he could not do.

[*447] The *judgment-debtor can not defeat the purchaser, nor affect the rights of the judgment-creditor or those claiming under him, by declaring he had no title to the land sold, or that the title to it was in a third person. The establishment of such a rule would be to invite and encourage fraud. In the case of *Phoenix v. Dey et al.*, 5 Johns., 412, the Court says that the declarations of a party to a sale or transfer, going to destroy and take away the vested rights of another, can not, *ex post facto*, work that consequence, nor be regarded as evidence against the vendee or assignee. So, it is decided that the declarations and confessions of parties, to the prejudice of the rights of third persons, are insufficient. 7 Cowen, 760. Admissions made by an insolvent debtor subsequently to insolvency, are not admissible against the trustees of his estate. *Smith v. Simmes*, 1 Esp. Rep., 330. When a plaintiff had, previously to the suit, assigned his interest in the debt, of which the defendant had notice, he could not impair that interest by any confessions subsequently made by him, to the prejudice of his assignee. *Frear v. Evertson*, 20 Johns., 142. So, in *Taylor et al. v. Marshal*, 14 Johns., 204, it is held, that after judgment and execution, an antecedent sale of the property levied on can not be set up and proved by the confessions and declarations of the parties, to the prejudice of the rights of a third person.

The law seems to be well settled, that the admissions and declarations of a party, that tend to injure or impair the vested rights of third persons, will not be received to their prejudice.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

A. S. White and R. A. Lockwood, for the appellant.

I. Naylor, for the appellee.

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MAIZE v. SEWELL.

EXAMINATION OF JUROR.—A juror may be asked on the *voire dire*, in a civil as well as in a criminal case, whether he has formed or expressed an opinion on the merits of the cause.

ERROR to the *Fayette* Circuit Court. *Mary Sewell* was the plaintiff below, and *John Maize* was the defendant.

[*448] *SULLIVAN, J.—This is an action for breach of promise of marriage. Plea, non assumpsit. Verdict and judgment for the plaintiff. During the progress of the cause exceptions were taken to the writ, to a variance between the writ and declaration, and to the relevancy of the testimony offered by the plaintiff, all of which are made a part of the record by bills of exceptions. It is not necessary for us to examine the points made upon the exceptions above referred to, because there is nothing in either of them which would induce this Court to disturb the verdict of the jury.

On another bill of exceptions filed in the cause, there is an error assigned which it is our duty to examine. That bill states “that on the trial, *Edmund J. Kidd* was called as one of the jury, to whom the defendant objected on the ground that *Kidd* had formed and expressed an opinion in the cause, and moved the Court for leave to ask said *Kidd* under oath, whether he had not formed and expressed an opinion in the cause, but the Court overruled the motion, and would not permit the question to be asked, and retained *Kidd* on the jury.”

It is contended by the plaintiff’s counsel, that the Circuit Court erred in not permitting the juror to be asked the question named in the above bill of exceptions.

We regard the law as being now well settled, that it is a good cause of challenge to a juror that he has expressed an opinion on the merits of the cause he is called upon to try. In *Cooke’s* case, 1 Salk., 153, it is said to be a good cause of challenge that a juror had expressed an opinion of the defendant’s guilt. In *Blake v. Millspaugh*, 1 Johns., 316, it was

decided that it was a valid exception to a juror's being sworn, that he had previously given an opinion on the question in controversy. So, in *Bac. Abr. tit. Juries, letter E, (5)*, it is said, if a juror has declared his opinion touching the matter, it is a principal cause of challenge.

The difficulty is in determining how proof of such an expression of opinion is to be obtained—whether by extrinsic evidence, or by questions put to the juror himself on the *voire dire*? It is undoubtedly true, that a juror can not be required to answer a question with regard to such causes of challenge as tend to his dishonour or discredit, but when they do not, he may be interrogated on the *voire dire*. In criminal cases, it is said that the expression of an opinion against the [*449] prisoner is *a misbehaviour. Such an expression may be referred to something of personal ill-will toward him, which the Court in *Rex v. Edmonds*, 4 B. & Ald., 471, pronounces “a very dishonorable thing.” In such cases therefore, a juror, were it not for the statute, could not be asked on the *voire dire*, whether he had not expressed an opinion in the case, because an answer in the affirmative might prove him guilty of a misbehavior, and tend to his disgrace. In this state, however, the law is settled by statute. R. C. 1831, p. 197; *M'Gregg v. The State*, November term, 1835. But in civil cases this rule does not hold. A juror, in such cases, may be asked on the *voire dire* whether he has expressed an opinion in the case about to be tried, because he may have done so without being guilty of misbehaviour or any thing dishonourable. In *Cooke's* case for high treason, above cited from *Salkeld, Powell, J.* says, “In a civil cause you may perhaps ask a man if he has not given his opinion beforehand on the right, for he might have done that as arbitrator between the parties: “otherwise in this case.” Here, the distinction is drawn between civil and criminal causes. In the one case, it is regarded as dishonourable and perhaps mischievous in society to express an opinion; in the other, an opinion may have been expressed in the character of a peacemaker, and a friend to both parties.

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We therefore think it is the right of a party to ask a juror on the *voire dire*, whether he has formed or expressed an opinion on the merits of the cause to be tried. The Court must decide, from the answer of the juror, whether he is disqualified or not.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

C. B. Smith and *C. H. Test*, for the plaintiff.

S. W. Parker and *J. Perry*, for the defendant.

EARLY v. PATTERSON.

PLEADING—PRACTICE.—To a suit on a promissory note, the defendant pleaded payment to a third person conformably to the plaintiff's written order, and set out the order in the plea. The replication, not sworn [*450] to, denied payment. *Held*, that under *the statute, the defendant might give the order in evidence without proving its execution.

PRACTICE.—If upon a demurrer to a plea being overruled, the plaintiff withdraw the demurrer and reply, he can not afterwards object, on error, to the overruling of the demurrer.

LETTER OF CREDIT.—A, holding a promissory note against B, gave C an order directed to B, as follows: "Let C have as much of my money in your hands as he wants, and I will credit the note with the same." *Held*, that the order, being unrecalled, authorized B, by making payments to C, from time to time, in cash or otherwise, to discharge the note.

ERROR to the *Marion* Circuit Court.

SULLIVAN, J.—This is an action of debt. The suit was commenced against the defendant, and one *James W. Beard* who was not found, and the process was so returned. The return was suggested on the record, and the suit was carried on against the defendant *Patterson*.

The declaration contains five counts. 1st, On a note under seal, dated *April* the sixth, 1833, for the sum of \$1,000. 2d, For money lent and advanced. 3d, For money paid, laid out, and expended. 4th, For money had and received to and for the use of the plaintiff. 5th, On an account stated.

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To the first count, *Patterson* pleaded three pleas. The first was a general plea of payment; and the second and third were also pleas of payment substantially as follows, viz: That the plaintiff by his certain letter of credit, order, or instrument in writing, dated *December* the 24th, 1834, under his hand, and addressed to the defendant, directed him to let one *James W. Beard* (being the same person impleaded with the defendant) have so much of plaintiff's money that was in the defendant's hands, as he (*Beard*) might want, and he (*Early*) would credit his note with the amount; which order or letter of credit is in the following words and figures, "Mr. *S. H. Patterson*, Please let Mr. *J. W. Beard* have so much of my money that is in your hands as he wants, and I will credit the note with the same. *December* 24, 1834. *Thomas Early*." That on the 31st of *December*, 1834, the defendant paid *Beard* the sum of \$500, he then being the holder and bearer of said order, for which *Beard* executed a receipt; that afterwards, on the 17th of *January*, 1835, he paid to *Beard* who was still the holder of the order, the further sum of \$718.50, being the balance due from the defendant to the plaintiff on the note named in the order; for which sum *Beard* also [*451] executed *a receipt, &c. To the remaining counts in the declaration, the defendant pleaded *nil debet*.

The plaintiff replied to the first plea, that the defendant did not pay in manner and form, &c., and demurred to the second and third; but the Court having intimated an opinion that the demurrer was not well taken, he withdrew his demurrer and replied to the pleas, denying the payment.

On the trial, the note described in the first count, with a credit indorsed on the back of it for the sum of \$500, dated *January* the first, 1835, was given in evidence. The defendant offered in evidence the order or letter of credit as set forth in his pleas of payment, signed by the said *Thomas Early*, to the introduction of which unless the defendant first proved its execution, the plaintiff objected, but the Court overruled the objection and admitted the evidence. The defendant also gave in evidence two receipts signed by *Beard*, having first proved

their execution, one for the sum of \$500, dated *December 31st*, 1834, and the other for the sum of \$718.50, dated *January 17th*, 1835. It was proved by a witness who was present at the execution of the last-named receipt, that there was at that time a settlement between *Beard* and *Patterson*, and that *Patterson* executed to *Beard* a note for some amount, but the witness did not know how much. The witness did not see the order at that time, nor did he see any money pass between the parties. It was proved by another witness, that in *October* or *November*, 1835, *Patterson* paid *Beard* \$500, in part discharge of a note then produced, and the witness understood there was a further sum to be paid. The plaintiff introduced in evidence a letter from *Patterson* to *Beard*, dated *February 3d*, 1836, in which, amongst other things, he expressed his surprise that his note was still in the hands of *Early*, and that *Beard* had not taken it up as he had represented.

By consent of parties the cause was tried by the Court, and upon the trial judgment was given for the defendant.

The first error assigned is, that the Court erred in permitting the order or letter of credit to be read in evidence on the trial without proof of its execution.

The practice act, R. C. 1831, p. 403, provides that no plea, replication, or other pleading, requiring proof of the execution of any instrument of writing which is the foundation [*452] of any *suit or defense, and is specially set forth in the declaration, plea, or other pleading, shall be received, unless supported by oath or affirmation. In the present case, the order is set out in the pleas and is the foundation of the defense. The replications deny the payment, but do not question the execution of the order; nor are the replications supported by oath or affirmation. The execution of the order, therefore, is not put in issue by the pleadings. The case of *Hagar v. Mounts*, 3 Blackf., 57, 261, does not at all conflict with this construction of the statute. In that case it was held, that if a special plea denying the execution of a note on which a suit is founded, be not verified by affidavit as the statute requires, and the plaintiff make no objection to the plea on

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that ground, but go to trial on the merits, he is presumed to have waived the formality of the affidavit. The distinction between the cases is obvious.

The next error assigned is, that the Court erred in not sustaining the demurrer to the second and third pleas. If the pleas demurred to were defective, the plaintiff should have stood upon his demurrer. By withdrawing it, and making an issue on the pleas, he acquiesced in the opinion of the Court, and the record stands, in that particular, as if no objection had been made to them.

The third assignment is, that the Court erred in giving judgment for the defendant, and in not rendering judgment for the plaintiff. The main question involved in this assignment is, what construction are we to give to the order of *Early* on *Patterson* in favour of *Beard*, and in what character are we to view *Beard*? Was he the agent of *Early* collecting for his use, as is contended by the plaintiff, or was he acting for himself and for his own benefit?

The rule is well settled, that in the case of an order or letter of credit, the words of it are to be taken as strongly against the drawer as the sense will admit. *Fell on Guarantees*, 129. With this rule in view, we can not think *Beard* was acting as the agent of *Early*, but that he was on the contrary acting for himself. The language of the order is, "Let Mr. J. W. *Beard* have so much of my money that is in your hands as he wants, and I will credit the note with the same." The object of *Early* was to relieve the necessities of *Beard*, and he left it with *Beard* to judge of the amount that would be [*453] required for *that purpose. When received, he employed it as he pleased, and became, instead of *Patterson*, the debtor of *Early*. *Beard*, therefore, was not collecting for *Early*, but was borrowing from him for his own benefit.

If we examine the language and object of the order, we think it will not be difficult to determine what construction should be given to it. The order was limited only by the wants of *Beard*, and the amount of *Early's* money in the

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hands of *Patterson*. It was dated on the 24th of *December*. On the 31st of the same month, *Patterson* paid *Beard* \$500, and in eighteen days thereafter he paid him another sum of money, the precise amount of which does not appear, and executed a note to *Beard* for the balance due from him to *Early*. It does not lie in *Early's* mouth to say, that because *Beard* received something else than cash, therefore it is no payment on the order. Suppose *Beard* had been indebted to *Patterson*, or being indebted to some other person, *Patterson* had assumed the debt and released *Beard* from all liability, would not the object of the parties have been as well met as if so much money had been actually paid to *Beard*? If *Beard's* wants were relieved by the notes or acceptances of *Patterson*, and he received them from *Patterson* by virtue of the order from *Early*, *Patterson*, we think, is entitled to a credit for the amount.

This case may be assimilated, in some particulars, to a contract for guaranteeing the payment of goods sold to a third person, not exceeding a specified sum. In such cases the guarantee stands until the credit is recalled. 12 East., 227; 2 Camp., 413. So, in the present case, *Patterson* might well pay to *Beard*, so long as he remained the holder of the order, all the money in his hands belonging to *Early*, unless notified by *Early* that he had recalled it. It does not appear from the record, in whose possession the order was at the time of the settlement on the 17th of *January*, 1835; but we presume it was in the possession of *Beard*, inasmuch as *Early* has not shown that he had recalled it, and given *Patterson* notice of that fact. This he was more especially bound to do, as he had been notified of the acceptance of the order by *Patterson*.

We, therefore, think we are authorized to construe this order as a continuing letter of credit. *Beard* and *Patterson* so understood it, and they so acted upon it. *Patterson* [*454] might pay **Beard* from time to time, as he (*Beard*) wanted the money, and upon giving his note or acceptance for the same, or any part of it, his obligation to pay was complete, and the debt to *Early* would be extinguished *pro tanto*. Chitt. on Cont., 278.

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DEWEY, J., having been concerned as counsel, was absent.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

C. Fletcher, O. Butler and W. Quarles, for the plaintiff.

J. Morrison, for the defendant.

CHILL, an Infant v. HORNISH and Others.

DESCENTS.—The legal holder of a certificate of the Agent of State for a lot in *Indianapolis*, devised an undivided moiety of it to *A*, his daughter. She married *B*, and, during the marriage, her moiety of the lot was set apart to her under authority of law. *A* died without having disposed of her interest in the property, and leaving by her marriage with *B* one son, *C*, her only heir. Previously to his wife's death, *B* obtained from the Agent of State a conveyance in fee for said half lot, and sold it after her death to a purchaser without notice. *B* died. Held, that the purchaser from *B* had no title to the premises, and that *C*, as the heir of his mother, was entitled to a conveyance for the same from the Agent of State.^(a)

ERROR to the *Marion* Circuit Court.

SULLIVAN, J.—The complainant, by his next friend, filed his bill in the *Marion* Circuit Court, representing that in the year 1821, one *Wilkes Reagan* purchased of the Agent of State for the town of *Indianapolis*, lot numbered twelve, in square numbered sixty, in said town, for the sum of eighty-seven dollars, one-fifth of which was paid in hand, and the residue to be paid in four equal annual installments; that the agent thereupon executed and delivered to *Reagan* a certificate of purchase according to law; that on or about the 5th of *April*, 1822, *Reagan* assigned the certificate to one *Knutt*, who afterwards, in *March*, 1823, assigned it to *Samuel Johnson*, the grandfather of the complainant; that *Samuel Johnson*, in *August*, 1824, departed this life, having first devised to his daughter *Sarah* (who was the mother of the complainant) and

^(a) See *Skelton & Co. v. Bliss*, 7 Ind., 77.

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her heirs, the undivided half of said lot; that *Samuel* [*455] *Johnson*, in his life-time, paid two *of the annual installments of the purchase-money for the lot, and the residue of the purchase-money was paid by his executor pursuant to directions in his will; that *Sarah Johnson* afterwards intermarried with *Zebulon Chill*, the father of the complainant.

The bill further charges that in the year 1826, said lot was, on the petition of *Z. Chill* and *Sarah* his wife, divided amongst the proprietors thereof by an order of the *Marion* Circuit Court, and the west half thereof was set apart to said *Sarah*; that she died soon thereafter, without having disposed of her right or any part of her interest in the lot, leaving the complainant her only child and heir at law; that during her life, *Z. Chill* fraudulently procured the Agent of State to make to him a deed of conveyance for the west half of said lot, and that after the death of his wife, he sold and conveyed the same to the defendant *Bennett*, who afterwards sold and conveyed to the defendant *Hornish*; that after the conveyance to *Bennett*, *Chill* departed this life, &c.

Bennett, *Hornish*, and *John Johnson* executor of the last will and testament of *Samuel Johnson*, deceased, are made defendants to the bill.

The answers of *Bennett* and *Hornish* deny all notice of the facts charged in the bill. They aver that when *Bennett* purchased of *Chill*, he (*Chill*) was in the quiet and undisputed possession of the premises; that they are innocent purchasers for a valuable consideration, &c. They deny all fraud, &c.

General replication by the complainant. *Johnson*, the executor of *Johnson*, deceased, makes no answer, and the bill as to him is taken as confessed.

The certificate of the Agent of State to *Reagan*, the original purchaser of the lot, with the assignments on it, the last will and testament of *Samuel Johnson*, deceased, and copies of the conveyances from the Agent of State to *Z. Chill*, from *Chill* to *Bennett*, and from *Bennett* to *Hornish*, are made parts of the record. The heirship of the complainant is proved by the

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admission of the parties, and by the testimony of *B. I. Blythe*. It is also proved that *Samuel Johnson* in his life-time, and his executor since his death, completed the payments for the lot.

The Circuit Court, on the final hearing of the cause, dismissed the bill at the cost of the complainant; and from that decree he has appealed to this Court.

[*456] *The office of Agent of State for the town of *Indianapolis* is created by the act of *January* the sixth, 1821, and the powers and duties of the agent are prescribed by that act. His powers, whether general or limited, are to be determined by reference to the act conferring them, and the validity of the defendant's title to the lot in controversy, will depend on the settlement of that point. The act, amongst other things, makes it the duty of the agent to attend the sales of lots at the seat of government, and to give the purchasers certificates of purchase, and when the payments are fully completed, to make to such purchasers, or their legal representatives, deeds in fee-simple for the lots so purchased by them. If the Agent of State, in conveying the property to *Z. Chill*, transcended the authority delegated to him by law, his principal is not bound by his acts, the title remains in the State, and the act of the agent is void.

All the power possessed by the agent to convey, is conferred by the above-recited act. His commission is to convey to purchasers or their legal representatives; and the question in the present case is, was *Z. Chill* the legal representative of the original purchaser of the lot in question? It is manifest he was not. If the conveyance had been made to *Z. Chill* and wife, or to *Z. Chill*, for the joint use of himself and wife, a different question, probably, would have presented itself to the Court. We know of no principle of law which vests in the husband, by virtue of the marriage, the title to the real estate of his wife. The agent therefore in conveying to *Z. Chill*, who was neither the original purchaser, nor his legal representative, departed from the authority conferred upon him. The law is well settled, that the acts of a special agent beyond the limits of his authority, will not bind his principal.

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A transfer of property by an agent, not authorized by his commission to make it, or which is not transferred according to the scope of his authority, passes no title to the thing transferred. 2 B. & A. 137. *Denning v. Smith*, 3 Johns., C. R. 344; *Allen v. Ogden*, 1 Wash., C. C. Rep., 174. So, where an agent misapplies property, it confers no better title on the receiver than he possessed himself. 1 Moore, 556.

Restricted as the agent's power is, to convey only [*457] to *purchasers or their legal representatives, we must regard him as an agent with circumscribed power and that his conveyance to *Z. Chill* is a void act and confers no title whatever. See *Petersdorff's Ab. tit. Principal an Agent*; *Newl. on Cont.*, 178; 1 *Salk.*, 96; *Payley on Agency*, 162, 3, 4; 1 *Atk.*, 497; 1 *Wash. C. C. Rep.*, 113.

If *Z. Chill* derived no title to the lot by the conveyance from the Agent of State, it is clear he could convey none. The legal title remains where it was previously to the conveyance. The defendants, *Bennett* and *Hornish*, may be purchasers for a valuable consideration, without notice, and yet have no title which a Court can protect. The protection which a Court of equity throws around innocent purchasers for a valuable consideration, can not be made to apply to their case.

We think the complainant is entitled to a conveyance of the property, but because the Agent of State for the town of *Indianapolis* is not made a party, he can not, in the present state of the pleadings, obtain the remedy he seeks. The Circuit Court instead of dismissing the bill, should have given the complainant leave to amend by making proper parties.

Per Curiam.—The decree is reversed. Cause remanded, &c. *C. Fletcher* and *O. Butler*, for the plaintiff.

J. Morrison, for the defendants.

Wiley v. The State.

WILLS v. THE STATE, in Error.

AN indictment charged that the defendant did feloniously *stal*, take and carry away, one watch of the value of five dollars, &c. Plea, not guilty. Verdict, "We find the defendant guilty of petit larceny, and that he be imprisoned," &c. Motion in arrest of judgment overruled, and judgment on the verdict. *Held*, that the use of the word *stal* instead of *steal*, was not a sufficient cause to arrest the judgment; but that the verdict did not authorize the judgment, as the defendant might have been guilty of petit larceny without being guilty of the larceny charged in the indictment.(a)

[*458] *MOORE v. BOND and Wife, in Error.

ON a trial of an action for slander, some of the actionable words laid in the declaration must be proved, or the plaintiff can not recover; proof of equivalent words will not do. *Wheeler v. Robb*, 1 Blackf., 330, and note.

WILEY v. THE STATE.

CHALLENGE OF JURORS.—On the trial of an indictment, three jurors may be challenged peremptorily on the part of the State, but no more.

ERROR to the *Hendricks* Circuit Court,

DEWEY, J.—This was an indictment for murder. Plea, not guilty. Verdict, guilty of manslaughter; and sentence to the penitentiary.

(a) This case is overruled by *Moon v. The State*, 3 Ind., 438; *Dukes v. The State*, 11 Ind., 557.

Wiley v. The State.

The record shows that the regular panel of the jury having been exhausted without the election of a jury, and four jurors *tales de circumstantibus* having been called, and accepted by the prisoner, the prosecuting attorney challenged them peremptorily, and his challenge was allowed by the Court—the prisoner objecting. This is the only error assigned.

The right of the State to make peremptory challenges depends upon our statutes. The forty-second section of the practice act provides, that in all actions that may be tried in any Court of record, “each party shall have the right of peremptory challenge to three jurors.” R. C., 1831, p. 408. By the eighty-first section of the act respecting crime and punishment, passed in the same year, it is enacted “that in all prosecutions for any capital offense, each party accused shall have the right to challenge twenty jurors peremptorily. R. C., 1831, p. 195. These two provisions not being incompatible, the former must be considered as embracing criminal prosecutions as well as civil cases, and with the greater reason, because in the same section was contained the only statute law which conferred the privilege of a jury *de medietate linguæ* in any case.

And it can hardly be supposed that the Legislature [*459] designed to make *a distinction, in this respect, between suitors in civil suits, and a defendant in a criminal prosecution, unfavourable to the latter. The subsequent repeal of this provision does not weaken the argument.

But the right of the State extends to the peremptory challenge of three jurors only. The Circuit Court, therefore, erred in permitting the prosecuting attorney thus to challenge a greater number.

Per Curiam.—The judgment is reversed, and the verdict set aside. Cause remanded, &c.

H. Brown, W. Quarles and C. C. Nave, for the plaintiff.

J. B. Ray, for the State.

END OF NOVEMBER TERM, 1837.

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1838, IN THE TWENTY-SECOND
YEAR OF THE STATE.

OFFUTT v. EARLYWINE.

SLANDER—A TRANSITORY ACTION.—An action of slander lies here for words spoken in another State, charging the plaintiff with being guilty of larceny.

SAME—JUSTIFICATION.—If the defendant in such action plead in justification that the words are true, he can not sustain his plea without proof, to the satisfaction of the jury, that the plaintiff was guilty of the offense charged.^(a)

ERROR to the *Rush* Circuit Court.

SULLIVAN, J.—The defendant in error brought his action of slander against the plaintiff in error in the *Rush* Circuit Court. The declaration alleges that the defendant below charged the plaintiff with stealing a horse. The defendant pleaded the general issue, and a special plea of justification, averring that on, &c., at, &c., in the State of *Kentucky*, the

^(a)See *Byrket v. Monohon*, 7 Blackf., 83.

said *Earlywine* did feloniously steal, take, and ride away one sorrel horse, the property of *Edward Linville*. Issue on the first plea, and the general replication *de injuria*, &c., to the second. The cause was tried by a jury. Verdict and judgment for the plaintiff below.

[*461] *During the progress of the trial, the plaintiff below introduced a witness by whom he offered to prove that the defendant had spoken the slanderous words in the declaration mentioned, in the State of *Kentucky*, to which the defendant objected, unless he would first prove that some of the words laid in the declaration were spoken in the county of *Rush*. The Court overruled the objection and admitted the testimony. After the testimony was closed, the defendant moved the Court to instruct the jury that if, from the evidence, they believed that it was "just as probable" that the plaintiff stole the horse named in defendant's plea of justification, as that he did not, they should find for the defendant. This instruction the Court refused to give, but instructed the jury that they should weigh the testimony, and if it were more probable from the evidence that *Earlywine* stole the horse named in said plea than that he did not, they should consider the plea sustained, and find for the defendant. The plaintiff then moved the Court to instruct the jury, that under the plea of justification, the defendant must prove that the plaintiff took the horse named in the plea, with a felonious intent. This instruction the Court gave, to which opinion of the Court in giving the last-named instruction, and refusing the former, the defendant excepted.

The special errors assigned are: 1st. The Court erred in permitting evidence to be given of words spoken in the State of *Kentucky*, no evidence of words spoken elsewhere having been proved. 2d. The Court erred in refusing the instructions asked by the defendant, and in giving the instruction asked by the plaintiff.

The words charged in the declaration, and proved to have been spoken, are actionable at common law. At the time they were spoken, the plaintiff below had a right of action against

Offutt v. Earlywine.

the defendant in the State of *Kentucky*, and the removal of the parties to this State did not divest that right. The action is transitory, and the defendant's liability follows him wherever he goes. This point was expressly settled in the case of *Stout v. Wood*, 1 Blackf., 71. In that case this Court held that slanderous words, actionable at common law, spoken in another State, will support an action here. It is not necessary that there should be proof of the speaking of the same or [462] other *slanderous words within the county, to give the Court jurisdiction.

In the instructions given by the Court to the jury on the application of the defendant, we see no error of which the defendant can complain. Proof that would raise a suspicion or probability merely of the plaintiff's guilt, would not be sufficient to sustain the defendant's second plea. The jury should be satisfied by proof that the plaintiff was guilty of the offense set out in that plea, and it is their province, on hearing the testimony, to weigh it and decide upon it. The Court ought so to have instructed the jury; and if either party is aggrieved by the instruction given, it is the plaintiff and not the defendant. Nor do we think the Court erred in instructing the jury, that under the plea of justification the defendant must prove that the plaintiff took the horse named in the plea with a felonious intent. The plea admits the speaking of the words, but justifies it because the plaintiff was guilty of the theft charged against him. The felonious intent is the gist of the offense: it is the very issue made by the plea. The defendant maintains that he had a right to speak the words laid in the declaration, because the plaintiff did feloniously steal, take and carry away the property therein named. If the taking was not felonious it was but a trespass, and would be no justification for speaking the words; if felonious, it is the ground of a good defense to the action, and the defendant having placed his defense on that point, should prove it.

In an action of slander for charging the plaintiff with perjury, it was held, on a plea of justification, that the plea must

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be sustained by two witnesses, or one witness and strong corroborating circumstances. 6 Cow. Rep., 118. So, in another case, for words charging the plaintiff with perjury, it was held by this Court that the defendant, to support his plea of justification, was bound to show that the plaintiff had sworn false on the trial to a matter material to the issue. If the matter sworn to was immaterial, there was no perjury, and the charge was without foundation. *M'Glemery v. Keller*, 3 Blackf., 488. If in an action for calling the plaintiff a thief, the defendant should justify because the plaintiff had stolen apples from the trees in his orchard, it is clear that the defense would be insufficient, because the words import a charge of trespass only, and not larceny.

[*463] *These cases are cited to show, that a crime charged against another by a plea of justification in slander, requires the same *kind* of proof to maintain it, that is necessary to convict him of the crime. Whether the same *strength* of evidence is required, we are not now called upon to decide.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

C. B. Smith and *C. H. Test*, for the plaintiff.

J. S. Newman and *D. Kilgore*, for the defendant.

YEATES and Wife v. REED and Wife.

SLANDER.—If in slander for actionable words, the speaking of the words be proved, and they be not explained or justified, the jury may infer that the charge is false and malicious. (a)

SAME—EVIDENCE OF DAMAGE.—In such case, evidence of actual damage is not necessary to the plaintiff's recovery.

SAME—EVIDENCE IN MITIGATION OF.—In a suit against husband and wife, for words spoken by the wife, evidence of the husband's efforts to prevent the circulation of the slander, is not admissible in mitigation of damages.

(a) *Byrket v. Monohon*, 7 Blackf., 83.

Yeates and Wife v. Reed and Wife.

SAME—PLEADING.—Slanderous words, spoken affirmatively in answer to a question, should be laid to have been spoken affirmatively; if spoken in the form of a question, they must be laid to have been spoken interrogatively. (a)

SAME—EVIDENCE UNDER GENERAL ISSUE.—Under the general issue in slander, the defendant may prove, either in excuse or mitigation according to circumstances, that he was insane when the words were spoken; the insanity, however, must be established, not by reputation, but direct proof.

ERROR to the *Henry* Circuit Court.

SULLIVAN, J.—This was an action of slander brought by *Reed* and wife against *Yeates* and wife. The declaration alleges, that the wife of *Yeates* charged the wife of *Reed* with whoredom and adultery. Plea, not guilty, and verdict for the plaintiffs below. Motion for a new trial overruled, and judgment on the verdict.

On the trial below, the defendants asked the Court to instruct the jury: 1. That the plaintiffs were bound to prove that some of the words proved to have been spoken, were uttered previously to the commencement of the suit. 2. That if the jury believed from the evidence, that the plaintiffs had sustained no damage from the speaking of the words, [* 64] they might find *for the defendants. 3. That *Yeates'* conduct in trying to prevent the circulation of the slanderous words, at the time they were spoken and afterwards, and his statement that the charge was false, may be considered by the jury in mitigation of damages. The Court declined giving the instructions as asked, but instructed the jury that if the slanderous words laid in the declaration, must be proved to have been spoken maliciously, and that if any words were proved to have been spoken that were slanderous in themselves, the jury might infer that they were false and malicious; that the jury should take all the circumstances of the case into their consideration in determining the malice; that they must believe from the evidence that the slander was uttered before the commencement of the suit; and that if it was so doubtful whether the words were uttered before the

(a) *Jones v. Chapman*, 5 Blackf., 88.

commencement of the suit that they could not determine that fact, they should find for the defendants.

It further appears from the bill of exceptions, that about the time of the commencement of the suit, Mrs. *Yeates* was seen crying; that she was asked by a witness in the case, why she was crying; and that in reply to that question, she uttered the words laid in the declaration. To this testimony the defendants objected, because the words were spoken in answer to a question, and the words in the declaration were laid as spoken affirmatively. The Court overruled the objection and admitted the testimony, to which the defendants excepted. The defendants then offered to prove in mitigation of damages, that, at the time of speaking the words, Mrs. *Yeates* was considered by all her neighbours to be labouring under mental derangement, but the Court refused the testimony, to which the defendants also excepted.

The plaintiffs in error contend that the Court erred in admitting the testimony objected to by them, and in refusing the testimony they offered, and that the Court also erred in the instruction given to the jury, and in refusing the instructions asked.

The first instruction asked by the defendants was given by the Court. The second and third were refused, and we think the Court committed no error in refusing them. If the words spoken are actionable of themselves, the natural consequence is, that damage has or will accrue to the person concerning whom they were spoken. The plaintiff is not bound [*465] to show *by proof that he has sustained actual damage, nor is he required in such cases to be prepared to rebut by proof testimony tending to show that he has sustained none. By proving the actionable words, he maintains the issue on his part; and the jury, unless the speaking of the words be explained or justified, is bound to give damages to some extent.

The efforts of *Yeates* to prevent the circulation of the slander, however laudable on his part, can in no wise mitigate the guilt of his wife. This we think too manifest to need further remark.

Nor do we think the Court erred in overruling the objection of the defendants below to the testimony offered by the plaintiffs. Slanderous words should be stated as they were uttered, and if in reply to a question, they were spoken affirmatively, they should be laid affirmatively in the declaration. But when they are uttered in the form of a question, they will not be admitted in support of a declaration charging them to have been spoken affirmatively, because, says the Court in the case of *Barnes v. Holloway*, 8 Term Rep., 150, there is often a manifest distinction between the same idea conveyed by words spoken affirmatively, and put interrogatively. If the words had been spoken in reply to a question by the plaintiffs, put with a design to procure their utterance for the purpose of suing the defendants, the plaintiffs could have maintained no action for words so spoken, because "they can not afterwards complain of that as an injury, which they have voluntarily occasioned." The latter principle was acknowledged by this Court in the case of *Gordon v. Spencer*, 2 Blackf., 286. It has no application, however, to the case before us.

The question, in reply to which the slanderous words in the present case were uttered, was not put by the contrivance of the plaintiffs, nor did the witness ask any question in reference to Mrs. *Reed* or her character; but in reply to the general question as to the cause of her grief, she spoke the words laid in the declaration and affirmed them to be true. We think the count was well supported by the proof.

The last point made by the plaintiffs is, that the Court below erred in refusing the general opinion of the neighbors as proof that Mrs. *Yeates*, at the time of speaking the words, laboured under mental derangement. Under the general issue in slander, the insanity of the defendant at the time [*466] of *speaking the words, may be given in evidence.

The proof will be received in excuse or in mitigation of damages, according to the circumstances of the case. *Dickinson v. Barber*, 9 Mass., 225. And it may be, that partial mental derangement on the subject to which the words relate, may also be given in evidence under the general issue.

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Horner v. Marshall's Adm'x., 5 Munf., 466. But these are facts that must be proved as other facts are proved. Neighbourhood reports or neighbourhood rumours are not sufficient to prove either. Such testimony would confuse rather than enlighten the jury. Some facts, from their nature, can be proved in no other way than by reputation, but insanity, if it exists, may be established by direct proof.(1)

We see no error in the record on which to reverse this case.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

D. Kilgore, for the plaintiffs.

C. B. Smith, for the defendants.

(1) *Vide Harbison v. Lemon*, Vol. 3 of these Rep., 51, and note.

RUNNION and Others v. CRANE and Another.

PRACTICE.—Neither rules to plead nor rule-days are authorized by our statute.

SAME.—A party can not be required to perfect his pleadings by a certain day in vacation; but a day during the term at which the cause is called, or during the subsequent term, may be set for that purpose.

SAME.—Upon the execution of a writ of inquiry after a judgment by default, in a suit on a promissory note, the execution of the note can not be disputed; but the jury must be satisfied that the note produced is the same with that described in the declaration.

SAME.—The jury of inquiry in such case is not obliged to disregard the note, because an erasure or alteration, which is unexplained, appears upon its face.(a)

APPEAL from the *Tippecanoe* Circuit Court.

DEWEY, J.—This was an action of assumpsit. The plaintiffs below declared on a promissory note against the defendants as partners, by which they promised the plaintiffs to pay them in four months, &c.

(a) See *Stoner v. Ellis*, 6 Ind., 152.

[*467] *At the term of the Circuit Court to which the process was returnable, the parties appeared, the cause was continued on the affidavit of the defendants, and they were *ruled* to plead within sixty days. This they failed to do. At the next term, the plaintiffs having made no attempt to take an interlocutory judgment against the defendants for failing to plead within the time limited by the Court, the defendants, before the calling of the cause, moved for leave to file the plea of non assumpsit, to which was appended an affidavit by one of the defendants, stating that the note mentioned in the declaration was originally drawn, payable in five months instead of four, and in that form was executed by the defendants, in the name of their firm, he the affiant having, as one of the firm, affixed the signatures, and that the word "five" had been erased and "four" inserted in its stead without the consent or knowledge of the affiant, or, as he believed, of the other defendants; and that, therefore, the defendants did not make the note described in the declaration.

The Court rejected the plea, and gave judgment against the defendants for failing to plead within the time limited by the Court at the term before. A jury was impaneled to assess the damages. After the plaintiffs had produced the note to the jury, the defendants offered to prove the facts set forth in the affidavit, but the plaintiffs objecting to the admission of the testimony, it was rejected. The defendants then moved the Court to instruct the jury, that if they believed from the appearance of the note, that an erasure or alteration had been made in it, they must, in the absence of explanatory proof respecting such erasure or alteration, disregard that instrument in the assessment of damages. The instruction was refused, but the Court charged the jury that they should be satisfied the note which the plaintiffs had given in evidence was the same described in the declaration. To all which the defendants excepted. The jury assessed the damages, and the Court rendered final judgment accordingly. From that judgment the defendants appeal.

The correctness of the decision of the Court, in rejecting the

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plea, must depend upon the construction of the 28th section of the practice act of 1831. That section provides that, if at the calling of the cause, the issue shall not be made up, the Court may enter judgment against the delinquent party, [*468] **“unless for good cause shown, they give him a further day in that or the succeeding term,”* to file his part of the pleading. The same section expressly dispenses with all rules to declare, plead, &c., and clearly contemplates, that if the issue shall be made up at the first, or, if time be given, at the next calling of the cause, no interlocutory judgment shall be entered. No rules to plead, or rule-days, are known to our system of practice as prescribed by law. We do not conceive that the provision above quoted invests the Circuit Court with discretionary power to fix a time in vacation, at which either party shall be required to perfect his pleading, but that their discretion is limited to the right of setting a day for that purpose, during the term at which the cause is called, or during the subsequent term. The *rule*, as it is called, to plead in sixty days, therefore, could have no other effect than to extend to the defendants the privilege of pleading before, or at the calling of the cause in the term to which it was continued. At that term, before the cause was called, the defendants offered their plea; and we think the Court erred in rejecting it.

Even had it been competent to the Court to rule the defendants to plead in vacation, it would have been erroneous to reject the plea which the defendants offered at the next term, for the 30th section of the same act provides, that *“when the plaintiff might take an interlocutory judgment, but fails to do so, the defendant may file any plea to the merits of the action.”* The plaintiffs did fail to take such a judgment or to attempt to take it, the plea was to the merits, and tendered before the calling of the cause.

There was no error in rejecting the evidence which was offered by the defendants to the jury of inquiry, nor in refusing the charge which was asked, nor in giving that which was given.

 Linnville v. Earlywine, an Infant.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the declaration set aside, with costs. Cause remanded, &c.

J. Pettit, A. S. White and R. A. Lockwood, for the appellants.
A. Ingram, for the appellees.

[*469] *LINVILLE v. EARLYWINE, an Infant.

GENERAL ISSUE.—The general issue admits the character in which the plaintiff sues.(a)

SLANDER.—Words spoken in another State, actionable at common law, are actionable here.

INSTRUCTIONS TO JURY—PRESUMPTIONS.—If an instruction to the jury be refused, and the record do not show its applicability to the case, it must be presumed to have been irrelevant and correctly refused.

[*470] SLANDER—PLEADING.—*When the words complained of in slander derive their slanderous import from extrinsic facts, the declaration must aver those facts, and connect them by a *colloquium* with the words laid.(b)

SAME.—In slander, neither equivalent words, nor words which derive their identity of meaning with that of those laid in the declaration from extraneous matter not averred, are sufficient to support the action.(c)

ERROR to the *Rush* Circuit Court.

DEWEY, J.—*Earlywine*, an infant, declared by his next friend against *Linville*, in slander. The declaration contains the usual *colloquium*, but no averment of extraneous facts. The words laid are: “The sorrel horse is mine and *Offutt’s*, and *Earlywine* stole him.” “*Earlywine* could be sent to the penitentiary for stealing.” “*Earlywine* could be sent to the penitentiary for stealing the sorrel horse.” “If he don’t get that horse, I will send him to the penitentiary.” “He stole a horse.” “He could be sent to the penitentiary for stealing the sorrel horse.” “He stole the sorrel horse.” Plea, the general issue. Verdict and judgment for the plaintiff.

(a) *Hollingsworth v. The State*, 8 Ind., 257.

(b) *Rodebaugh v. Hollingsworth*, 6 Ind., 339; *Hays v. Mitchell*, 7 Blackf., 117.

(c) *Creelman v. Marks*, 7 Blackf., 281.

Linnville v. Earlywine, an Infant.

Several points arose from instructions refused and given.

1. The Court refused, on motion of the defendant, to charge the jury that if the plaintiff had not proved his infancy, he could not sustain the action. There was no error in this. The general issue admitted the character in which the plaintiff sued.

2. The Court refused to instruct the jury, that if the only slanderous words which the defendant had spoken of the plaintiff were uttered in *Kentucky*, they must find for the defendant. This refusal was correct. Words, slanderous by the common law, spoken in another State, are actionable in this State. *Stout v. Wood*, 1 Blackf., 71.

3. The Court also refused to instruct the jury, that "if the only words proved to have been spoken by the defendant of the plaintiff were, 'he has taken the horse without leave or license, and if he don't get him, I will prosecute him for stealing,' the action could not be sustained." As the record does not show the evidence, we have no means of judging of the applicability of this instruction to the case. As the charge was refused, we must presume that it was irrelevant to the evidence, and correctly rejected.

4. On motion of the plaintiff the Court did instruct [*471] the jury *that "a charge of taking a horse, if spoken under circumstances reasonably conveying the meaning of stealing, is in substance a charge of stealing;" and, also, "a charge that '*Earlywine* took the horse' is in substance the same as that '*Earlywine* stole the horse,' if spoken in such manner as exactly to convey the same meaning." It is a well established principle in actions of slander, that when words are uttered which derive their slanderous import from facts, circumstances, or manner, extrinsic from the words themselves, the declaration must contain an averment of such facts, circumstances, or manner, and connect them by the *colloquium* with the words as they were spoken. This done, the proof must sustain the averments, and show that the words laid in the declaration, or enough of them to convey the same meaning, were spoken. *Stark.*, on Sl., 272, 289;

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Cro., Eliz., 834; *Sweetapple v. Jesse*, 5 Barn. & Ad., 27; *Ayre v. Craven*, 2 Ad. & Ellis, 2. It is also settled as a consequence of this principle, that equivalent words—that is, words different from those laid in the declaration, but having the same sense, will not suffice in proof. *Wheeler v. Robb*, 1 Blackf., 330. The self-evident proposition contained in the two singular charges which were given to the jury, (they both express but one idea), can not be said to violate the first of these principles, because there is no part of the declaration to which to apply it under that rule; but had the declaration shown, that the defendant charged the plaintiff with “taking a horse,” or that “he took a horse,” without averring any explanatory circumstances, that principle would have been infringed by the instructions. As applied to the charge of stealing a horse, which is laid in the declaration, the instructions, difficult as it is to give them any legal signification at all, had a tendency to mislead the jury, and to give them to understand, not only that equivalent words, but words which derived their identity of meaning with that of those laid in the declaration from extraneous matters not averred, were sufficient to support the action. In this view, these instructions are clearly erroneous.

Some other charges were given at the request of the plaintiff, which bear too strong a likeness to those already noticed to need further comment.

Per Curiam.—The judgment is reversed and the [*472] verdict set aside, with costs, to be paid by the *prochein amy*. Cause remanded, &c.

C. H. Test and *C. B. Smith*, for the plaintiff.

D. Kilgore and *J. S. Newman*, for the defendant.

THE CORYDON STEAM-MILL COMPANY v. PELL.

STOCK SUBSCRIPTION—PLEADING.—In a suit by *The Corydon Steam-Mill Company* for an installment on stock subscribed for in the company, the

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declaration should state by whom the subscription was received, and should allege that notice to pay the installment had been given agreeably to the charter.

ERROR to the *Harrison* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by *The Corydon Steam-Mill Company* for a certain sum of money, alleged to be due from the defendant to the plaintiffs for stock in the mill. There were originally six counts in the declaration, but the fourth was withdrawn.

The first count states, that the defendant had agreed in writing to take six shares of stock in the mill, each share being fifty dollars, and that, by means thereof, he had become liable to pay for the same; that the defendant had paid five dollars on each share, but had refused to pay the residue; that the directors, by advertisements posted up at five of the most public places in the county, pursuant to the statute, had required the defendant to pay the balance due on the stock, but that he had refused to do so. The second count relates to four shares of the stock, and is the same as the first count, except that it states the defendant to be the assignee of the original owner of these shares. The third is a general count. It states that the defendant was indebted to the plaintiffs in a certain sum, for the balance due on six shares of the stock subscribed for and held by the defendant, and for the balance on four shares of the stock subscribed for by one *Abraham Pell* and transferred to the defendant, then due and payable on demand; and that, by reason of the premises, an action had accrued, &c. The fifth count is similar to the first, and the sixth is similar to the second.

[*473] *General demurrer to the declaration and judgment for the defendant.

There is one valid objection to the first, second, fifth and sixth counts. They do not show with whom the contract for taking the stock was made. According to the charter of the company, the commissioners were to receive subscriptions for the stock until the directors were appointed; and after that, the directors were to receive the subscriptions. Stat., 1834, p.

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85. The counts in question being for the non-payment of stock, and not stating by whom the subscription for the stock was received, can not be supported. They are founded on a breach of contract, and ought certainly to have shown with whom the contract was made. There are some other objections made to these counts, but they are not well founded.

There is a valid objection, also, to the third count. The installments for stock subscribed for in the company, which are the foundation of this count, were not payable by the charter, unless a previous notice of thirty days to pay the same had been given to the defendant. No count, therefore, for any such installment can be good, which does not allege that the notice to pay the same had been given conformably to the charter. The third count contains no such allegation of notice, and is for that reason defective.

DEWEY, J., having been concerned as counsel was absent.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

J. W. Payne and R. W. Thompson, for the plaintiffs.

H. P. Thornton, for the defendant.

HUMBLE v. WILLIAMS.

APPEAL FROM A JUSTICE.—The transcript filed by a justice on an appeal, did not state that the appeal had been prayed for or granted. The judgment was rendered on the 21st of *June*, 1836, and the transcript, appeal-bond, &c., were filed on the third of *August* following. *Held*, that the filing of the transcript, &c., was sufficient evidence, *prima facie*, that [*474] the appeal had been duly prayed for and granted. **Held*, also, that if the appeal-bond so filed be insufficient, a new one may be filed.(a)

SAME—PRACTICE.—The objection to an appeal from the judgment of a justice, that the papers were not filed in time, may be waived by the appellee.

RIGHT OF PROPERTY—AFFIDAVIT.—The affidavit and claim of a third person to the property taken in execution, should show whether the claim-

(a) *Wolf v. The State*, 11 Ind., 231; 8 Blackf., 185.

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ant be the absolute owner, or whether his claim be conditional, and if the claim be conditional, whether it was created by deed or by parol; but if the objection for a defect in these particulars be not made before the justice, it is waived.(a)

APPEAL from the *Owen* Circuit Court.

BLACKFORD, J.—*David Humble* obtained a judgment before a justice of the peace against *John Williams*, and took out an execution on the judgment. The execution was levied upon a mare and colt as the property of the execution-defendant. *James Williams* filed with the justice the following claim to the property, viz.: “*James Williams* claims a certain sorrel mare and colt taken by an execution, wherein *David Humble* is plaintiff and *John Williams* is defendant, to satisfy said execution. *James Williams*.” There is annexed to this claim an affidavit, stating “that the claim is true in substance, and is a matter of fact.” The triers who were appointed to determine as to the validity of the claim, decided in favour of the claimant; and the justice, accordingly, gave judgment in his favour, on the 21st of June, 1836. The justice who rendered the judgment, filed in the clerk’s office on the 3d of August, 1836, a transcript of the judgment, the claim and affidavit of the claimant, and an appeal-bond in the cause executed by *Humble* and his sureties. This bond appeared on its face to be dated on the 12th of June, 1836, and to have been acknowledged before the justice and approved of by him. At the October term, 1836, the parties appeared, and agreed that no objection on account of the papers not having been filed in time by the justice, should be made to the appeal. At the October term, 1837, the appeal was dismissed on the motion of *Williams*, the appellee.

The grounds upon which the appeal was dismissed are the following: 1st. That the justice’s transcript does not show that an appeal was prayed. 2d. That the appeal-bond is insufficient. 3d. That the transcript was not filed within twenty days after the appeal was taken.

(a) *Morris v. Detar*, 5 Blackf., 31.

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The record shows, that before the dismissal of the appeal, the appellant offered to file a sufficient bond, but that [*475] the *Court refused to receive it. It appears also that before the appeal was dismissed, the appellant offered to prove that there was a mistake in the bond as to the date; that the bond was filed with the justice *after* the judgment and within ten days thereafter; and that an appeal was prayed and granted within ten days after the rendition of the judgment, but that the Court would not permit these facts to be proved.

We do not think that any of the grounds upon which this appeal was dismissed can be sustained.

It is not absolutely essential to the support of the appeal that the transcript itself should show that it had been regularly applied for by the appellant and granted by the justice. Such matters may be proved by extrinsic testimony. In this case, the fact that the justice had filed in the clerk's office the transcript of the judgment, the claim and affidavit of the claimant, and the appeal-bond in the cause, was sufficient evidence, *prima facie*, that the appeal had been properly prayed for and granted. And the same fact, that those papers had been so filed, was also sufficient to authorize the appellant, when the sufficiency of the bond was objected to in the Circuit Court, to file a new bond to the satisfaction of the Court.

There is nothing in the objection, that the papers in the cause were not filed by the justice within the time prescribed by the statute. That objection was waived in the Circuit Court by an agreement of the parties. The statute in question is to be construed like other statutes of limitation. The party interested may take advantage of the statute, or he may waive the benefit of it, at his discretion. This point was decided at the last term.(1)

It is contended by the judgment-creditor, that the suit ought to have been dismissed by the Circuit Court, on the ground that the affidavit of the claimant is defective. The defect complained of is, that the affidavit does not show the nature of the claim. We think the affidavit is liable to the objection

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made to it. The affidavit and claim in these cases should show whether the claimant was the absolute owner, or whether his claim was conditional, and in the case of a conditional claim, whether it was created by deed or by parol. Stat. 1834, c. 195. But the objection does not appear to have been made before the justice on the trial of the right of property; and it is too late to make it, for the first time, after an appeal.

[*476] **Per Curiam*.—The judgment is reversed with costs.

Cause remanded, &c.

A. Kinney, for the appellant.

C. P. Hester, for the appellee.

(1)Vide *Dougherty v. Mason*, and note, ante, p. 432.

SHANKS v. LUCAS, Administrator, in Error.

IF a person entitled to a land certificate under the act of Congress of the 23d of May, 1828, die, the certificate issues to his heirs. Whether, when the certificate has so issued and there is a deficiency of assets, the executor or administrator can require the certificate or its value from the heirs?—*quære*.

BARKELOO v. RANDALL and Another.

ATTACHMENT—WHEN PARTIES TRESPASSERS.—A justice of the peace who issues a writ of domestic attachment, by which the goods of an absconding debtor are attached, without requiring a bond to be previously filed according to the statute—and the party who procures such writ to be issued without previously filing the bond—are trespassers, and liable as such to the party injured.(a)

APPEAL from the *Rush* Circuit Court.

(a)See *Rosenthall v. The Madison, etc., Co.*, 10 Ind., 361; *Allen v. Chadsey*, 1 Ind., 399.

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SULLIVAN, J.—This was an action of trespass *de bonis asportatis*. The defendants severed in their pleas. *Randall* pleaded that on the 6th of *September*, 1836, at, &c., the defendant, *Kay*, appeared before him, the said *Randall*, then and there being an acting justice of the peace in and for the county of *Rush*, and made and filed his affidavit, stating, among other things, that the said *Barkeloo* was justly indebted to said *Kay*, in the sum of fifty dollars, &c., and that *Barkeloo* so concealed himself, that the ordinary process of law could not be served upon him, &c., whereupon said *Randall* [*477] issued his writ *of domestic attachment directed to a constable of the proper county, commanding him to attach the goods and chattels of said *Barkeloo*; that the writ was delivered to the proper officer, and by virtue thereof the goods and chattels named in the declaration were duly attached, &c. *Kay* also pleaded that on, &c., at, &c., he appeared before said *Randall*, then and there being an acting justice of the peace in and for *Rush* county, and made and filed an affidavit stating, among other things, that said *Barkeloo* was justly indebted to him, said *Kay*, in the sum of fifty dollars, &c., and that *Barkeloo* so concealed himself that the ordinary process of law could not be served upon him; that said *Randall* thereupon issued a writ of domestic attachment directed to a constable of the county, commanding him to attach the goods and chattels of *Barkeloo*; that said writ was duly delivered, &c., and the goods and chattels of the plaintiff in the declaration mentioned were, by virtue thereof, attached; which is the same taking, &c. The defendants also pleaded the general issue.

To the special pleas of the defendants the plaintiff replied, that the said *Kay* sued out the writ of attachment, and said *Randall* issued the same without any bond being filed by *Kay*, as required by law, conditioned for the due prosecution of the writ of attachment, and for the payment of all damages that might be sustained by the plaintiff, if the proceedings of *Kay* in the attachment should be wrongful and oppressive. These replications were by the Court below, on general demurrer,

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adjudged bad, and final judgment was given for the defendants; whereupon the plaintiff appealed to this Court.

The first section of the act authorizing domestic attachments provides, that when any person shall so abscond, or conceal himself, that the ordinary process of law can not be served upon him, it shall and may be lawful for his creditor or creditors, to appear before a clerk of the Circuit Court or justice of the peace, and make oath to that fact, and that the defendant is justly indebted to affiant, &c., and upon filing such affidavit, and his bond with surety in double the sum demanded, payable to the defendant, and conditioned for the due prosecution of the writ of attachment, and the payment of all damages that may be sustained by the defendant, if the proceedings thereon shall be wrongful and oppressive, a writ of domestic attachment shall issue. By the second sec-

[*478] tion of the act, each *and every justice of the peace before whom such affidavit and *bond shall be filed*, is authorized and required to issue a writ of domestic attachment.

The questions made for our consideration are: 1st. Was the filing of the bond an indispensable requisite to give the justice of the peace jurisdiction? and, 2d. Whether the action should not have been case instead of trespass?

When Courts of special and limited jurisdiction exceed their rightful powers, the whole proceeding is *coram non judice*; and all concerned in such void proceedings are liable to an action by the party injured. In *Elliott v. Peirsol*, 1 Peter's U. S. Rep., 340, it is said that if a court act without authority, its judgments and orders are regarded as nullities. They are not only voidable but void: and in *Wise v. Withers*, 3 Cranch, 331, it is acknowledged to be a principle, that a decision of such a tribunal in a case clearly without its jurisdiction, can not protect the officer who executes it; but that the Court and the officers are all trespassers. It is only while they act within the authority conferred upon them, that the law throws its protection around them. An excess of jurisdiction, as for instance, issuing a warrant to apprehend without information, on oath. will render the justice liable. *Vosburgh v. Welch*, 11

Johns., 175. And where there is an indispensable requisite to bring his official power into action, and that requisite be not complied with, his acts are null and void, and the justice of the peace, and the party procuring the act to be done, are liable to the party injured in an action of trespass. 1 Bald., 571. Where a party procures an inferior magistrate to exceed his jurisdiction, and extend his powers to a case to which they can not lawfully be extended, he becomes a trespasser, and is amenable to the party injured. *Curry v. Pringle*, 11 Johns., 444. In the case of *Gold ads. Bissell*, 1 Wend., 210, it is held that in cases where a summons is the regular process, a warrant without oath is irregular and void. Without the oath, the justice has no jurisdiction over the person of the defendant, and all parties concerned in an arrest, under such process, are trespassers. In *Vosburgh v. Welch*, above cited, which was an action of trespass brought against a justice of the peace for issuing an attachment against the goods of the plaintiff, as an absconding debtor, without legal proof of the fact of concealment as required by the statute, it was held that if a [*479] justice issues his *attachment without oath, he must be considered as issuing it without authority, and is liable in an action of trespass *de bonis asportatis*. Numerous cases might be adduced to show, that where a court of inferior and limited jurisdiction acts without authority, or exceeds the authority conferred upon it, the court, the parties, and the officers who execute the decision, are all trespassers.

If in the present case, no affidavit had been filed as required by the statute, it would not have been pretended, but that the justice of the peace who issued the writ by which the property of the defendant was attached, and the party who procured it to be issued, were trespassers. Why may the bond be dispensed with, and not the affidavit? The statute places both on the same footing, and expressly provides that when *both* are filed, the justice of the peace shall be *authorized* to issue the writ.

Our view of the law therefore is, that a justice of the peace who issues a writ of domestic attachment, by which the property of an absconding debtor is attached, without requiring a

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bond to be first filed according to the statute, and the party who procures such writ to be issued without first filing his bond, are trespassers, and as such liable to the injured party.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. B. Smith, for the appellant.

C. H. Test and *J. Perry*, for the appellees.

HATTEN v. ROBINSON,

VARIANCE.—A count on a promise to execute a promissory note is not sustained by proof of a promise to pay money.

MONEY HAD AND RECEIVED.—To sustain a count for money had and received, it must appear that the defendant had received *money* due to the plaintiff or something which he had really or presumptively converted into money before suit brought, or which he had received as money and instead of it. (a)

SAME—EVIDENCE.—A promissory note is not evidence, on a count for money had and received, against one of the makers who is only a surety for the other.

[*480] *APPEAL from the *Fountain* Circuit Court.

DEWEY, J.—Assumpsit. The declaration contains two special counts, one founded on a promise by *Hatten* to *Robinson* to execute to him a promissory note for \$700, the other on a promise to make a note for \$600; there is also a count for money had and received. Plea, the general issue. The cause was submitted to the Court without a jury. Judgment for the plaintiff.

The evidence was as follows: One *Howard*, with *Hatten* as his surety, had given to *Robinson* a promissory note for \$700, the consideration of which was corn purchased by *Howard* from *Robinson*. *Howard* absconded. *Robinson* and *Hatten* pursued and overtook him. It was arranged among the three, that *Howard* should pay *Robinson* \$100, and execute

(a) See *Helvey v. The Board, &c.*, 6 Blackf., 317.

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his four notes to *Hatten*, with one *Kelley* as his surety, each for \$150, payable in one, two, three, and four years, with ten *per cent.* interest; that *Robinson* should deliver up, as satisfied, the note for \$700 against *Howard* and *Hatten*; and that *Hatten* should become solely responsible to *Robinson* for \$600, the balance of the \$700 due on the note given up. This arrangement was carried into immediate execution, and *Hatten* repeated his promise to *Robinson* to pay him the \$600, and often, afterwards, admitted the promise and his liability to pay the money. To the sufficiency of this evidence the defendant objected; his objection was overruled, and he excepted.

We do not think the evidence justifies the finding and judgment of the Circuit Court. The special counts are not sustained, because they lay promises to execute notes; and the undertaking proved was to pay money. This variance is fatal.

The general principle governing actions for money had and received is, that the defendant must have come to the possession of *money*, which he can not conscientiously withhold from the plaintiff. But as the action is equitable in its character, and peculiarly designed for the advancement of justice, many cases have been decided in favour of plaintiffs with strong claims to redress, in which the defendants have not actually received money. In all these cases, however, they had received something which really, or presumptively, was converted into money before suit brought, or which was received as money and instead of it. The defendant in this case did not [*481] *receive any money; nor can it be presumed that the notes which he did receive had produced money at the commencement of the action, for none of them was due at that time; nor did he receive these notes as money, either in his own estimation or in that of the plaintiff.

Could the plaintiff have maintained an action for money had and received on the original note for \$700 which was cancelled, or in other words, if that note would have been evidence that its makers owed him for money had and received, he could contend, with great plausibility, for success in this suit. That a promissory note is such evidence against a

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maker who has been benefited by its consideration may be true; but it is not evidence of money had and received against a surety who had no connection with the consideration, *Wells v. Girling*, 8 Taunt., 737. Had either of the special counts been sustained by the evidence, the result might have been different. As the case presents itself, the action can not be maintained.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. S. White, R. A. Lockwood, and J. Pettit, for the appellant.
I. Naylor, for the appellee.

SCANLAND v. RUBLE, Administratrix.

ESTOPPEL.—The general issue and a special plea in bar were filed, in a justice's Court, to a suit by an administratrix, and the cause was then transferred to the Probate Court. *Held*, that the defendant could not afterwards deny the character in which the plaintiff sued.

ERROR to the *Spencer* Probate Court.

DEWEY, J.—The plaintiff below as administratrix of *W. Ruble*, sued the defendant, in assumpsit, on an account in favor of her intestate, before a justice of the peace of *Spencer* county. The defendant appeared before the justice and filed his account against the intestate by way of set-off. He also claims the benefit of the general issue under the [*482] statute. The *plaintiff required the justice to certify the proceedings to the Probate Court, from which she received her character of administratrix. The justice accordingly certified the case to the Probate Court of *Spencer* county. A jury trial was there had. Verdict and judgment for the plaintiff.

In the progress of the trial the defendant offered to prove that, at the time of the commencement of the suit before the

justice, the plaintiff had ceased to be the administratrix of *W. Ruble*, in consequence of not having filed a bond under the provisions of a statute of 1834, respecting the destruction of the records of *Spencer* county, and that she did not receive her authority until after the transfer of the cause into the Probate Court. The Court rejected the testimony, and the defendant excepted. This decision is assigned as error.

The plaintiff in error contends, that in Courts of limited jurisdiction, the defendant may show want of jurisdiction under the general issue in any stage of the trial. This doctrine is correct; but to ascertain whether it is applicable to this case, we must look into the proceedings before the justice of the peace, and their effects upon the cause. Justices of the peace have jurisdiction over suits by executors or administrators, as fully as they have over those commenced by any other person,—subject, however, to the right of the plaintiff to transfer the cause to the Probate Court, whenever payment, set-off, or other special matter in bar may be pleaded. Stat., 1832, p. 251.(1) The plea of non assumpsit, which is supposed to have been pleaded before the justice, would certainly have left the defendant at liberty to show that the justice had no jurisdiction over the cause, had the trial taken place before him. But proof that the plaintiff had ceased to be administratrix, or, in other words, that she was not administratrix at the time of the commencement of the suit, would not have affected the jurisdiction of the justice. He had cognizance over the cause of action independently of that matter. It is true, that had *ne unques administratrix* been pleaded and the plea sustained by the evidence, the action must have failed; but such a plea could not have been successfully framed to the jurisdiction of the Court. It must have been in bar of the action, or perhaps to the disability of the plaintiff in abatement. We can see no reason, therefore, for giving to the plea of the general issue in this case a different effect from

[*483] *that which it would have if pleaded in a Court of general jurisdiction. The usual consequence of pleading it to actions by executors or administrators, is to admit the

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character of the plaintiff. Such we think is its effect in this case. It admits, not the jurisdiction of the Court, but the fact that the plaintiff is the administratrix of *W. Ruble*. In this situation, with this implied admission upon the record, the cause entered the Probate Court. We know no rule of law, and there is certainly no maxim of justice, which authorizes the defendant to disprove a fact in the Probate Court, which before the justice, he had deliberately admitted and was estopped from denying. The general issue must have the same effect in every stage of the cause.

We are of opinion, therefore, that when a defendant has pleaded the general issue and special matter in bar to an action by an executor or administrator, commenced before a justice of the peace and which has been transferred to the Probate Court, he is not permitted in that Court to deny the character in which the plaintiff sues.

We have looked through the evidence which is spread upon the record, and think the Probate Court committed no error in refusing the motion for a new trial.

Per Curiam.—The judgment is affirmed with five *per cent.* damages and costs. To be certified, &c.

J. A. Brackenridge, for the plaintiff.

S. C. Stevens, for the defendant.

(1) Accord. Rev. Stat. 1838, pp. 364, 365.

TOURTELOTT and Another v. JUNKIN and Others.

JOINT AND SEVERAL CONTRACTS.—*A* took a lease of real estate, covenanting to pay rent, &c. Several weeks afterwards, *B* agreed with the lessor by a writing obligatory to be surety for the lessee. *Held*, that the contracts of *A* and *B* were several, and did not subject them to a joint suit.

ERROR to the *Pike* Circuit Court.

BLACKFORD, J.—This was an action of covenant [*484] by the *trustees of certain school land, founded on

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an indenture of lease. The breach assigned is the non-payment of rent.

The declaration states that the plaintiffs, on the 23d of *January*, 1830, leased certain land to *Tourtelott*, one of the defendants, for two years from the first of *March*, 1830; that *Tourtelott*, by a covenant in the lease, was to pay twenty dollars of the rent on the 25th of *December*, 1830, and sixty dollars of the rent, on the 25th of *December*, 1831; but that the defendant, *Tourtelott*, had not paid the rent agreeably to his contract. The declaration further states, that after the execution of the indenture of lease between the plaintiffs and *Tourtelott*, to-wit, on the 14th of *February*, 1830, the other defendant, *Stewart*, by his agreement under seal, covenanted with the plaintiffs to become surety to them for *Tourtelott's* faithful performance of his covenants contained in the lease. The declaration then concludes by saying, that by means of the non-performance of *Tourtelott's* covenants in the lease, the plaintiffs have sustained damage to the amount of \$200.

There was a general demurrer to this declaration, and a judgment for the plaintiffs.

The judgment, in this case, is wrong. The suit is against two persons for a breach of contract, and it can not be sustained if the contract be not a *joint* one. *Tourtelott* leased the land from the plaintiffs on the 23d of *January*, 1830, and bound himself, by a covenant in the lease, to pay the rent as it became due. Several weeks afterwards, to-wit, on the 14th of *February*, 1830, *Stewart* obligated himself, by another instrument under seal, to become surety for *Tourtelott's* compliance with his agreement. These contracts are entirely separate and distinct. The land, according to the declaration, was leased by the plaintiffs to *Tourtelott*, upon the consideration, not of a *joint* covenant by *Tourtelott* and *Stewart* to pay the rent, but of *Tourtelott's* covenant alone for the payment of it. *Stewart* is not a party to the lease. The consequence is, that a suit founded on the covenant to pay rent, contained in the lease, can be sustained only against *Tourtelott*, the lessee of the premises. *Stewart* may, perhaps, be liable on his own subsequent

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and separate covenant with the plaintiffs, but the action in that case, if sustainable, must be brought against him alone.

[*485] **Per Curiam*.—The judgment is reversed with costs. Cause remanded &c.

D. M' Donald, for the plaintiffs.

J. Law, for the defendants.

THE STATE BANK OF INDIANA v. BROOKS.

PRACTICE.—A special demurrer can not be filed after the day for which the cause is set for trial.

SAME.—After judgment for the plaintiff on demurrer to the declaration, in a suit on a promissory note, it is unnecessary, on executing the writ of inquiry, to prove the execution of the note.

PLEADING.—As to the form of a declaration in an action on several bank notes.

JURISDICTION AS TO AMOUNT CLAIMED.—Whether the declaration shows a sum due sufficiently large to give the Circuit Court jurisdiction depends, not upon the amount of any one particular item, but upon the whole amount, demanded in the declaration.(a)

APPEAL from the *Marion* Circuit Court.

BLACKFORD, J.—*Brooks* brought an action of assumpsit against *The State Bank of Indiana*. The object of the suit was to recover the amount of several bank-notes, alleged to have been made by the bank, and payable to the bearer at the branch bank at *Indianapolis*.

The declaration, after particularly describing each of the notes, avers that the plaintiff was the lawful bearer and owner of the notes; that payment in gold or silver had been demanded at the branch bank, and been refused; that by means thereof the defendant became liable to pay the notes to the plaintiff, with interest at the rate of twelve *per cent.* per annum, when such payment should be demanded. It is further averred that, being so liable, the defendant, in consideration of the

(a) See *Epperly v. Little*, 6 Ind., 344.

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premises, promised to pay the notes when required. The breach is then assigned that the defendant had not paid the amount of the notes and interest, or any part thereof, although often requested. To the plaintiff's damage \$1,200.

It is said that there was a motion to quash the writ in this case, and that the motion was improperly overruled. But as the writ is not inserted in the record, we have no [*486] means of *examining the objection, and must presume the decision of the Court to be correct.

The cause was docketed for the second day of the term, and on the third day the defendant filed a special demurrer to the declaration. The Court, on the plaintiff's motion, set aside the special causes of demurrer. This decision is right. The statute is express that no special demurrer shall be filed after the day for which the cause is docketed. Rev. Code, 1831, p. 403. (Rev. Stat., 1838, p. 449.)

On the general demurrer to the declaration, there was judgment for the plaintiff. This declaration is not in the usual form of declarations on several promissory notes. We think, however, that although it might be objectionable on special demurrer, it is, in substance, sufficient.

After the judgment on demurrer, the parties submitted the assessment of damages to the Court. The plaintiff offered the notes in evidence without proof of their execution. The evidence was objected to, but the objection was overruled, and the notes were read. This evidence was rightly admitted. Proof of the execution of the notes could not have been required, even on the plea of non-assumpsit, unless the plea had been verified by affidavit. R. C., 1831, p. 403. (Rev. Stat., 1838, p. 449.)

An objection is made to the amount of the judgment, on the ground that as some of the notes are for a sum within a justice's jurisdiction, those notes could not be included in this suit. There is nothing in this objection. It is the whole amount of the several sums demanded in the declaration, and not the amount of any one particular item that is to be considered in respect to the jurisdiction of the Court.

Hobson v. Doe, on the Demise of Harper and Others.

Per Curiam.—The judgment is affirmed, with **three per cent.** damages and costs.

C. Fletcher and *O. Butler*, for the appellant.

J. Morrison, for the appellee.

[*487] *HOBSON v. DOE, on the Demise of HARPER and Others.

PRACTICE.—If a suit be brought to the Supreme Court a second time on appeal or writ of error, the proceedings since the cause was remanded can only be examined.

EXECUTION—CERTIFIED COPY OF.—An execution when returned is a record and may be proved by a copy certified under the seal of the Court.^(a)

STATUTE CONSTRUED.—The statute of 1820, prohibiting the sale of real estate on execution for less than two-thirds of its appraised value, applies only to sales on judgments rendered after the passage of the statute.

COPY OF DEED.—*Seemle*, that the grantee of a registered deed can not give a certified copy of it in evidence, without accounting for the absence of the original.

ESTOPPEL.—A judgment-debtor can not set up a title in a third person to defeat a purchaser under the judgment.

APPEAL from the *Scott* Circuit Court. This was an action of ejectment by the appellee for a tract of land in *Clark* county.

SULLIVAN, J.—This suit was originally commenced in the *Clark* county Circuit Court, and was removed by change of venue to the Circuit Court of *Scott* county. The cause was tried in the latter Court at the *July* term, 1829, and judgment was rendered for the plaintiff below. The defendant appealed to this Court, and at the *May* term, 1830, the judgment of the [*488] *Circuit Court was reversed and a *venire facias de novo* awarded. The cause was again tried in the *Scott* Circuit Court at the *September* term, 1835, and judgment was again given for the plaintiff. The defendant has again appealed to this Court.

The lessors of the plaintiff rest their claim to the land on a

(a) *Doe v. Allen*, 2 Ind., 167.

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purchase made at a sheriff's sale. The bill of exceptions informs us, that on the 19th of *August*, 1819, one *Redman* obtained a judgment in the *Clark* Circuit Court against *Hobson*, the plaintiff in error, for the sum of 528 dollars; that on the 14th of *February*, 1820, a *feri facias* was issued and levied on the fifty acres of land now in controversy; that afterwards, on the 24th of *April*, 1820, a *venditioni exponas* issued commanding the sheriff to sell the land, by virtue of which he did, on the 8th of *May*, 1820, expose the same to public sale, at which the lessors of the plaintiff became the purchasers. On the trial in the Circuit Court, the plaintiff offered in evidence a certified copy of the record of the judgment in favour of *Redman* against *Hobson*, also certified copies of the *feri facias* and *venditioni exponas* issued on said judgment, and the returns made to them, all under the seal of the *Clark* Circuit Court. To the introduction of this testimony *Hobson* objected, but the Court overruled the objection and admitted the testimony. The plaintiff also introduced the sheriff's deed for said land, made to the lessors of the plaintiff who were the purchasers at the sale. He also offered in evidence a copy of the recorded copy of a deed from *Ferguson* and wife to *Hobson* for said land, the introduction of which was objected to by the defendant below, but the Court admitted the evidence and the defendant excepted.

The errors relied on are: 1st, That the Court erred in permitting the plaintiff below to introduce as evidence *copies* of the writs of *feri facias* and *venditioni exponas*, by which the land was levied on and sold, without accounting for the non-production of the originals. 2d, That the sale of the land by the sheriff to the lessors of the plaintiff was illegal and wholly void, because he was not at that time authorized to sell the same, for a less price than two-thirds of its appraised value. 3d, That the Court erred in permitting the plaintiff to introduce as evidence, the copy of a copy of the deed from *Ferguson* and wife to *Hobson*, without accounting for

[*489] the absence of *the original, and without adducing proper proof of the execution of said deed.

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The remaining point relied on by the plaintiff in error relates to a supposed error committed previously to the rendition of the former judgment in the Court below. We do not notice it in this opinion, because we have restricted ourselves, in the examination of the case, to the proceedings had subsequently to the reversal of that judgment.(1)

The plaintiff in error takes no exception in the argument to the opinion of the Court below, admitting a copy of the record of the judgment in favour of *Redman* against *Hobson* in evidence. His objections are to the admission of the copies of the writs and returns upon them, as evidence of the levy and sale of the land. Our statute requires the sheriff to make return of all executions that come to his hands, with his doings thereon; and it is the duty of the clerk to file them amongst the papers of the Court, that they may be preserved and used as evidence whenever needed. When filed, all the objections which apply to the removal of any other record will apply to their removal. *Starkie*, in his Treatise on Evidence, part 2, sec. cxi, says, that if a writ be returned it is a record, and may be proved as other records are proved; that is, by an examined copy certified by the officer that has the custody of it, under the seal of the Court. If the writ be not returned, it is not a record, and in such case can only be proved by the production of the original. In the present case the executions were duly returned, and the copies offered in evidence were properly certified. In actions of ejectment in *England*, such proof is received. In the case of *Ramsbottom v. Buckhurst*, 2 M. & Selw., 565, which was an action for use and occupation brought by a tenant by *elegit*, it was decided that an examined copy of the judgment-roll containing the award of the *elegit* and the return of the inquisition, was sufficient proof of the plaintiff's title; and the *elegit* itself, or the inquisition, was not required. On this point, therefore, the Court below committed no error.

The judgment in favour of *Redman* against *Hobson* was rendered on the 19th of *August*, 1819, and the law which forbade the sale of real estate on execution at less than two-thirds

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of its appraised value, was approved on the 18th of [490] *January*, *1820. That law applied only to sales under judgments rendered after its passage. The first section of the act expressly restricted it to judgments thereafter to be rendered. The last proviso in the second section of the act, forbidding any sheriff or other officer to whom *any execution* should be directed, to sell real property for a less sum than two-thirds of its appraised value, is to be construed in connection with the context, and, we think, can only properly apply to any execution issued on such judgments as were embraced by the law.

In reference to the third error relied on, it may be said that if it had been necessary for the plaintiff below to prove *Hobson's* title to the land, the testimony adduced was, perhaps, insufficient for that purpose. But this was unnecessary. The lessors of the plaintiff derived title from *Hobson*, and he can not dispute their title. He can not set up an outstanding title to defeat the purchaser under a judgment against himself; and in cases where the debtor is in possession of the land, the purchaser is not required, in ejectment against him, to prove that he had title to it. See *Jackson dem. Masten v. Bush*, 10 Johns., 223; *Adams on Eject.*, 247. The introduction, therefore, of the copy from the record did no injury to the defendant below, because the plaintiff's proof was sufficient without it.

DEWEY, J., having been concerned as counsel, was absent.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

H. P. Thornton, for the appellant.

S. C. Stevens, for the appellee.

(1) *Acc. Himely v. Rose*, 5 Cranch, 313; *Browder v. M'Arthur*, 7 Wheat., 58; *ex parte Sibbald v. The United States*, 12 Peters, 488, 492.

Matheny v. Westfall.

[*491]

*MATHENY v. WESTFALL.

PRACTICE.—The Circuit Court having determined there was no variance in this case, the Supreme Court, under the circumstances, refused to interfere.

WITNESS.—If the payee of a note assign it, and the assignee sue the maker, the plaintiff having released the payee, may examine him as a witness to prove the execution of the note.

ERROR to the *Owen* Circuit Court.

SULLIVAN, J.—This was an action of assumpsit on a promissory note, commenced by *Westfall*, assignee of *Goodin*, against *Henry Matheny* and one *Gabriel Johnson*, before a justice of the peace. *Matheny* appeared, and by proper plea denied the execution of the note. On the trial, the justice of the peace gave judgment against *Matheny*; against *Johnson*, judgment was taken by default. The case was appealed to the Circuit Court, where the judgment of the justice of the peace was affirmed.

On the trial in the Circuit Court, the plaintiff introduced *Goodin*, the payee of the note, who was released by the plaintiff, as a witness to prove its execution. The defendant objected to the introduction of *Goodin* as a witness, but the Court overruled the objection and admitted him. The plaintiff also introduced in evidence the note on which the suit was founded; to the introduction of which the defendant objected, because the note offered in evidence purported to be a note signed by "*John Johnson* and *Herry Matty*, and not by *Gabriel Johnson* and *Henry Matheny*." This objection was also overruled by the Court, and the note admitted in evidence.

The plaintiff seeks to reverse the judgment of the Circuit Court, first, because there is a variance, as he contends, between the note produced in evidence and the note described in the plaintiff's cause of action; and, secondly, because the payee of the note, *Goodin*, was admitted as a witness, on the trial, to prove its execution.

On the first point, it may be sufficient to say that we have no evidence that the variance insisted on by the plaintiff exists.

Jones v. Rodman and Another, on Appeal.

The Circuit Court, who by consent of parties tried the cause, having determined, from an inspection of the original paper and the testimony of witnesses sworn on the trial, that the note was signed by the defendants, as described in the [*492] *plaintiff's cause of action, we do not feel authorized, under the circumstances of this case, to interfere with that determination.

On the second point, that is, whether the payee of a note who has assigned it to a third person, may, on being released from all liability, be a witness in a suit between the assignee and the maker to prove the execution of the note, we think the law is settled that he may. The objection to the competency of a witness on the ground of interest, may be removed at any time before he is sworn by an extinguishment of that interest, by means of a release. If, in the present case, *Goodin* was an incompetent witness, it was because as assignor of the plaintiff he would be liable to him on the contract of assignment, in case the plaintiff did not recover against the defendants. But so soon as *Westfall* released him from that liability, his interest in the event ceased, and his competency was restored. The Court of Appeals of *Kentucky*, in *Duncan v. Pindell*, 4 Bibb., 330, and in *Ford v. Hale*, 1 Monroe, 23, has so decided, and we think those decisions are, upon principle, correct. Stark. Ev., part 4th, p. 758, and notes; p. 1061, and notes.

Per Curiam.—The judgment is affirmed with 5 *per cent.* damages and costs. To be certified, &c.

C. P. Hester, for the plaintiff.

A. Kinney, for the defendant.

JONES v. RODMAN and another, on Appeal.

TWO days after the rendition of a judgment by a justice in favour of the plaintiff, the defendant obtained a new trial. On

Canby v. Ingersol.

the day fixed for the new trial, the parties appeared, and the plaintiff obtained a continuance on account of the absence of witnesses, whom he had subpœnaed, making no objection to the previous proceedings. On the day to which the cause was continued, the parties appeared and the cause was tried, the previous proceedings not being objected to. Verdict and judgment for the plaintiff. The defendant appealed. *Held*, that the plaintiff's affidavit that the justice's first judgment was rendered in the plaintiff's absence, and that the [*493] new trial *was applied for and granted without his knowledge, was not a sufficient ground, under the circumstances, for dismissing the appeal. See 11 Ind., 335.

CANBY v. INGERSOL.

WORK AND LABOR.—If a party having covenanted to perform certain work, has performed it, but not agreeably to the covenant, the person for whom it was done may, either expressly or impliedly, render himself liable in assumpsit for the work done.(a)

SAME—EVIDENCE.—The special agreement in such case is admissible evidence for the plaintiff, to prove the value of the services rendered.

ERROR to the *Marion* Circuit Court.

DEWEY, J.—Assumpsit for work and labour. Plea, the general issue. Judgment for the plaintiff.

The parties made an agreement under seal, by which *Ingersol*, the plaintiff below, agreed to dig certain mill-races for *Canby*, the defendant below, in a particular manner and by a specified time; and the latter agreed to pay him therefor a designated price. The work was commenced and a part of it performed, under the contract, by the time specified; a considerable portion of it, however, remained undone at that period, but was finished afterwards, with the approbation of *Canby* and agreeably to his instructions. He erected his mill upon

(a) *Lomax v. Bailey*, 7 Blackf., 599.

Canby v. Ingersoll.

the works, and has used them ever since. The Court instructed the jury, that it was for them to say whether, under the circumstances, *Canby* had so far waived or abandoned his rights under the special contract, as to render himself liable upon an implied promise to pay *Ingersoll* a reasonable compensation for his labour. This charge was excepted to.

We see no error in it. The law is, that when a party has made a covenant to do work, or perform anything else, and has done or performed it, but not agreeably to the covenant, the party who has received the benefit of the other's labour or performance, may, either expressly or impliedly, render himself liable in assumpsit; and it is the province of the jury to judge whether he has done so or not. This point was fully considered and settled in the case of *Sinard v. Patterson*, 3 Blackf., 353.

[*494] *Exception was also taken to the admission in evidence of the special agreement. It appears by the record, that it was introduced by the plaintiff below, and admitted by the Court, only for the purpose of proving the value of the services rendered. Though it certainly was not legal evidence to sustain the action, we know of no objection to it as testimony of the value of the work that had been done for the defendant, which would not equally apply to his opinion on that subject expressed in any other manner. We think the evidence was correctly admitted for the limited purpose stated.

Per Curiam.—The judgment is affirmed with five *per cent.* damages and costs.

C. Fletcher, O. Butler and W. Quarles, for the plaintiffs.

H. Brown, for the defendant.

Doe, on the Demise of Morris, v. Himelick.

DOE, on the Demise of MORRIS, v. HIMELICK.

TAX TITLE.—The purchaser of real estate for taxes must prove, *inter alia*, in making out his title, that the precept required by the statute had been received by the collector, authorizing him to collect the taxes.^(a)

WITNESS.—An agent is generally admitted as a witness, from necessity, to prove his delivery of goods or payment of money for his principal.

APPEAL from the *Franklin* Circuit Court.

BLACKFORD, J.—Ejectment. Plea, not guilty. There was a special verdict, which, so far as it is necessary to state it, is as follows: That the land in question was, in 1826, liable to assessment for taxes, and was assessed accordingly; that the owner of the land, by his agent, paid to the collector, before the sale in 1826, all the taxes which were required of him, but did not pay the taxes on the land described in the declaration; that the collector sold the land to the lessor of the plaintiff, at the time and in the manner stated in the collector's deed. The verdict then sets out the collector's deed, and states that the defendant is in possession under a conveyance executed to him by the patentee of the land. Upon this verdict, the Court gave judgment for the defendant.

The facts set out in this special verdict do not show [*495] that the *plaintiff is entitled to recover. There is no statement by the jury that the precept required by the statute had been received by the collector, authorizing him to collect the taxes. The verdict, to be sure, sets out the collector's deed, and that deed is *prima facie* evidence, under the statute, that the collector, after the receipt of the precept, had done his duty relative to the sale. *Parker v. Smith*, May term, 1835. But the deed is no evidence that the collector had authority to sell the land. The existence of the precept, authorizing him to act in the premises, should have been proved *aliunde*. This case may be compared to the evidence required of a purchaser of real estate at a sheriff's sale under execution. It is settled in such case that the judgment and

(a) See cases cited in *Given v. Shuman*, 23 Ind., 32.

execution must be produced as well as the sheriff's deed, in order to show the authority of the sheriff to sell. *Armstrong v. Jackson*, November term, 1822. The judgment on the special verdict is therefore correct.

There is one other question raised in the cause. The defendant, at the trial, offered to prove by his agent that the witness had paid the taxes. The witness was objected to as being interested, but the objection was overruled. The case, however, does not require an opinion respecting the admissibility of the witness, as the jury have found the payment not to have been made. It may be observed, however, that an agent is generally admitted, from the necessity of the case, to prove the delivery of goods, or the payment of money by him for his principal. 1 Stark. Ev., 120.

DEWEY, J., was absent.

Per Curiam.—The judgment is affirmed. To be certified, &c. Judgment for costs against the lessor of the plaintiff.

J. Ryman, for the appellant.

G. Holland, for the appellee.

[*496] *M'CALL v. TREVOR and Others.

APPEAL-BOND.—An appeal-bond is not objectionable merely because the condition is, *inter alia*, for the payment of all costs that have or shall accrue, &c., instead of *and shall accrue*, &c.

SAME—PRACTICE.—An appeal will not be dismissed for the insufficiency of the appeal-bond if a good bond be filed on the calling of the cause.

EXECUTION, AMENDMENT OF.—A mistake in the amount of an execution is amendable, at any time, by the judgment.

EXECUTION, LIEN OF.—A *fiери facias* in *A*'s favour was delivered to the sheriff, but before it was levied, another in favour of *B* was delivered to a constable, and levied. *A*'s execution was then levied on the same property. *Held*, that if *B*'s execution be duly proceeded in to a sale, it has the preference; but if, instead of being so perfected, it be recalled, the lien of *A*'s execution stands in force. (a)

(a) *Johnson v. M' Lane*, 7 Blackf., 501.

McCall v. Trevor and Others.

SAME.—A sale of goods by an execution-defendant, though *bona fide* and for value, if made after the delivery of the execution to the sheriff, does not affect the lien of the execution.

APPEAL from the *Henry* Circuit Court.

BLACKFORD, J.—*Trevor* and others recovered a judgment against *Carroll* in the *Henry* Circuit Court, at the *October* term, 1836. The judgment was for the sum of \$1,327.84, together with costs. On the 23d of *May*, 1837, an execution issued on this judgment. The execution stated that the judgment was for the sum of \$1,404.92, together with costs, and directed the sheriff to collect that amount. The execution was delivered to the sheriff on the 27th of *May*, 1837, and was levied on two certain horses on the 18th of *July*, 1837. *M'Call* filed before a justice of the peace a claim to the horses as his property, and, upon a trial before the justice of the right of property, he obtained a judgment in his favour. The execution-plaintiffs appealed to the Circuit Court.

M'Call moved to dismiss the appeal, because the instrument filed as an appeal-bond was not sealed. The Court granted a rule upon the defendants to show cause why the appeal should not be dismissed. The defendants thereupon filed a new appeal-bond, and the rule was discharged. The new bond is conditioned for the prosecution of the appeal with effect, and for the payment of the condemnation money and "all costs that have or shall accrue in the suit." This new bond was

objected to, on the ground that the words in the [*497] condition "or shall accrue in the suit," ought to have been "*and shall accrue in the suit,*" but the objection was correctly overruled.

The cause was submitted to the Court, and the judgment is as follows: That the horses belong to *Carroll*, and are subject to the defendants' execution; that they are worth \$170; and that the claimant pay the costs.

The first objection made to these proceedings is, that the appeal should have been dismissed. There is no reason for this objection. The statute provides, that the appeal shall not be dismissed on account of the informality or insufficiency of

the appeal-bond, if the appellant will file a good one on the calling of the cause. R. C. 1831, p. 317. This provision applies to the present case.

The next objection made is, that, at the trial of the cause, the defendants were permitted to amend the execution so that the amount should correspond with the judgment. It is evident that the mistake was merely clerical; and it was therefore amendable by the judgment. This point was decided at the *November* term, 1836, in the case of *Doe*, dem. *Wilkins*, v. *Rue* and others.

There is one other objection. The plaintiff contends that the evidence does not support the judgment.

The material facts are these. The execution of the defendants against *Carroll* was delivered to the sheriff *on the 27th of May*, 1837, and was levied on the horses in question *on the 18th of July*, 1837. Two executions in favour of *Holland* against *Carroll* were issued by a justice of the peace, and delivered to a constable, *on the 30th of May*, 1837. One of them was levied on the horses *on the 19th of June*, 1837. The other was also levied on the horses, but the date of the levy does not appear. Another execution in favour of *Widup* against *Carroll*, was issued by a justice and delivered to a constable *on the 20th of June*, 1837, and was levied on the same horses, but the time of the levy is not shown. *On the 30th of June*, 1837, *M'Call* entered himself as replevin-bail in these cases, and all the executions which had been issued in them were accordingly recalled on the same day. On that day, also, *Carroll* executed to *M'Call* a bill of sale for the horses, but retained them in his own possession for and at the request of *M'Call*.

[*498] *The judgment for the defendants, upon these facts, is clearly right.

The horses were bound for the payment of the defendants' execution from *the 27th of May*, 1837, the day when it was delivered to the sheriff, and they continued to be so bound at the time the plaintiff filed his claim. It is true that one of the executions issued by the justice, though not delivered to the

constable until the 30th of *May*, 1837, was levied on the horses *before* the levy of the defendants' execution; and it must be admitted, that if the execution first levied had been proceeded in, to a sale, it would have been entitled to the preference. But as this execution issued by the justice, together with the others which he had issued against *Carroll*, was not proceeded in after the levy, but was recalled, the priority occasioned by the first levy was lost, and the horses remained liable, as before the issuing of the executions by the justice, to the execution of the defendants. This point is rendered clear by the statute of frauds. The statute, after saying that the property shall only be bound from the time when the writ is delivered to the officer, enacts, that the lien shall be "divested in favour of another execution in the hands of another officer, without regard to the time of delivery, if such other officer make the first levy *and proceed with due diligence in perfecting execution of the same.*" R. C. 1831, p. 276. This statute shows, that the first levy does not divest the previous lien, unless the levy be duly followed by a sale of the property. If the execution first levied be recalled, as it was in the case before us, the lien of the other execution stands in full force.

The plaintiff's only claim to the horses is founded on the bill of sale. Assuming the sale to have been upon a valuable consideration and *bona fide*, still, as it was not made until long after the defendants' execution was delivered to the sheriff, it does not affect the lien of that execution. *Bingh. on Executions*, 190; *Watson on Sheriffs*, 175, 176.(1)

Per Curiam.—The judgment is affirmed with *ten per cent.* damages on the value of the property levied on, and costs.

S. W. Parker, for the appellant.

C. B. Smith, J. Raviden, and J. S. Newman, for the appellees.

[*499] *(1) After a *fiery facias* has been delivered to the sheriff, the defendant may convey his goods; but the sheriff has a right to levy the execution notwithstanding the transfer. By the statute of frauds, the right which was given to the sheriff by the writ to seize the property, no longer speaks from the *teste* of the writ, but from the time of its *delivery*, upon the receipt of which the sheriff is to levy; but, subject to the execution, the

Becket v. Sterrett.

debtor has a right to deal with his property as he pleases; and if he transfers it in *market overt*, the right of the sheriff ceases altogether. *Samuel v. Duke et al.* in Excheq., 1838, 16 Leg. Obs., 436; S. C., 3 Mees & Welsby, 622. Vide *Payne v. Drewe*, 4 East, 523.

BECKET v. STERRETT.

SLANDER—PRACTICE.—Two persons were disputing about their partnership accounts as merchants, when one charged the other with pilfering out of the store. Slander for these words. *Held*, that to charge another with pilfering is actionable. *Held*, also, that it was not error to permit the plaintiff on the trial to ask a witness, who heard the charge, what he understood by it, nor to refuse the defendant leave to prove that the plaintiff attended alone to the store. *Held*, also, that the judgment in this case against the defendant, on his demurrer to the evidence, was not erroneous.

APPEAL from the *Fayette* Circuit Court.

SULLIVAN, J.—The declaration charges the defendant below with speaking of the plaintiff these words: “You pilfered money out of the store, and I can prove it.” “You stole money.” The defendant pleaded not guilty.

On the trial, one witness proved that he heard *Becket* say to *Sterrett*, you pilfered or filched money. Whether he said pilfered or filched, the witness could not recollect. At the time of speaking the words, the parties were examining certain books of accounts and comparing them. They had been partners in a store before that time, and the books and accounts they were examining and talking about, were those of the partnership. *Becket* was calling upon *Sterrett* for an account of profit and loss at the time the words were spoken. Another witness swore that he heard the same conversation. The parties were disputing about some credits in one of the partnership books, when *Becket* said to *Sterrett*, “You pilfered money out of that store.” The conversation was about their joint stock of goods, accounts and moneys; but whether

[*500] *the defendant meant to charge the plaintiff with stealing the partnership money or not, he did not understand.

The witness was then asked by the plaintiff what he understood by the words, "you pilfered money out of that store." The defendant objected to the witness answering the question, but the Court overruled the objection and directed him to answer. The witness said he understood the words to mean, that the plaintiff had stolen the money out of the store of the defendant. The defendant then asked the witness whether the plaintiff below had not "attended alone" to the store, in which the plaintiff and defendant were partners. To this question the plaintiff objected, which objection the Court sustained, and refused to permit the witness to answer the question. To these opinions of the Court, the defendant excepted.

On a demurrer to the evidence, which was filed by the defendant, the Court held the same sufficient to maintain the plaintiff's action, and judgment was rendered accordingly.

The errors assigned are: 1st, That the Court erred in permitting the witness to give his understanding of the meaning of the words used by the defendant below. 2d, That the Court erred in refusing to permit the defendant to prove that *Sterrett* "attended alone" to the store in which they were partners. 3d, That the Court erred in deciding the evidence on demurrer to be sufficient to maintain the plaintiff's action.

1. How far it is proper for a witness to be permitted to give his understanding of the meaning of words used in his hearing, it is not necessary in this case to decide. The words "to pilfer," in their plain and popular sense, mean to steal. To charge another with pilfering, is to charge him with stealing. The words are so manifestly slanderous, that the opinion or understanding of the witness as to their meaning, can not change their character, and we presume it had no influence in the decision of the case. The first error assigned, therefore, can not avail the plaintiff.

2. On the second point, we do not perceive that the Court

erred. If *Sterrett* did "attend alone" to the store, it would afford to the defendant neither justification nor excuse for the words spoken by him.

3. The third error assigned presents a question of more difficulty, and that is, whether the words used by [*501] the *defendant below, were so explained by reference to the partnership money, as to render them not actionable. It is a well settled principle, that where words otherwise actionable are explained at the time by reference to a particular transaction, which is known not to amount to the charge which the words would otherwise import, they shall be construed accordingly, and will not be actionable. Many cases are reported which establish and illustrate this principle. But in all such cases, the charge should be accompanied by explanatory words, or the subject-matter in allusion to which the words were spoken, should be clearly such as to show they were not actionable. Bac. Abr. tit. Slander. R.

In this case, the defendant charged the plaintiff with pilfering money out of the store. There were no words used referring to partnership moneys in the custody of the plaintiff, nor that the money of the partnership was the subject-matter, in reference to which the words were spoken, and being unexplained by the speaker, we will not search for reasons to rebut the presumption that he intended to charge the plaintiff with a felony. There are various ways in which the plaintiff could steal money out of the store without interfering with the partnership money; and it must be intended, that the words import a charge of stealing *that* of which he could be a thief. See *Morgan v. Williams*, 1 Strange, 142.

In cases like the present, it is a proper question for the jury to decide, whether the words impute a charge of felony, or refer to conduct of the plaintiff not amounting to felony. *Cristie v. Cowell*, Peake's Cas., 4. What the jury would have done in this case, had it not been taken from them by a demurrer to the evidence, we do not know. It is enough for us to know that the jury might have inferred from the testimony, that the words did impute a charge of felony to the plaintiff;

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and that being sufficient to maintain the plaintiff's action, the judgment must be affirmed.

Per Curiam.—The judgment is affirmed with 5 *per cent.* damages and costs. To be certified, &c.

C. H. Test and *S. W. Parker*, for the appellant.

C. B. Smith and *J. Perry*, for the appellee.

[*502] *PELTIER v. BRITTON, Administrator.

VARIANCE.—Assumpsit; judgment against the defendant by default; damages assessed at \$220.75, and final judgment accordingly. The writ describes the plaintiff as administrator *de bonis non* of *A*, and states the damages at more than were assessed. The declaration describes the plaintiff as administrator of *A*, and states the demand to be \$300 due the intestate, concluding to the plaintiff's damage — hundred dollars. *Held*, that the judgment was not erroneous; the variance between the writ and declaration, and the omission in the conclusion of the declaration of the amount of damages, being cured by the statute of *jeofails*.

DEFECTS CURED BY VERDICT.—An inquiry of damages cures all defects that are cured by a verdict.

ERROR to the *Allen* Circuit Court.

SULLIVAN, J.—This was an action of assumpsit. The defendant did not appear in the Circuit Court, and judgment was taken against him by default. The jury impaneled to inquire into the plaintiff's damages assessed them at \$220.75. The original writ is made part of the record, and the sheriff's return shows that it was duly served. The plaintiff below declared in general terms as the administrator of *Cushman*, deceased, for the sum of \$300 which the defendant owed to *Cushman* in his life-time; and the declaration concludes "to the damage of said *Britton*, as administrator as aforesaid, — hundred dollars." In the writ, the plaintiff represents himself as administrator *de bonis non*.

It is contended by the plaintiff in error, first, that the variance between the writ and declaration is fatal on a writ of

error; and, secondly, that the Court erred in rendering judgment on the assessment of damages by the jury, because the amount of damages assessed by the jury is greater than the amount of damages laid in the declaration.

If the plaintiff in error had appeared in the Circuit Court, and at the proper time taken his exceptions to the writ and declaration, we presume the Court would have held them to be well taken. But after the assessment of damages by the jury, it is too late to take advantage of the defects complained of.

The statute of *jeofails* provides that "no judgment after the verdict of twelve men shall be stayed or reversed for any defect or fault in the writ original or judicial, or for a variance in the writ from the declaration or other proceedings," [*503] or "for a *mistake in the name of either party, sum of money, &c., the name or sum being right in any part of the record or proceedings," &c. And the statute further provides that "no judgment, after *an inquiry of damages*, shall be stayed or reversed for any omission or fault which would not have been good cause to stay or reverse the judgment if there had been a verdict," &c. We suppose that if the plaintiff in error had appeared in the Circuit Court, and without noticing the defects complained of, had pleaded to the action, and judgment had been rendered against him on the verdict of twelve men, it would not be contended by him, with this statute in view, that, for the reasons assigned, that judgment ought to be reversed. The defects are, to our view, plainly such as would be cured by such a verdict.

The statute places judgments rendered on an inquisition of damages, and on the verdict of a jury, on the same footing, and whatever defects are cured by the one, are cured by the other.

If, in the present case, the plaintiff had declared *in his own right*, when the process sued out by him was in his special character as administrator *de bonis non*, it may be that the statute would not have cured that defect. But as the writ and declaration both show the representative character of the plaintiff, and vary only in the kind of administration granted

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him, we think the statute protects the judgment of the Circuit Court.

With regard to the omission to lay the amount of the damages in the conclusion of the declaration, it may be sufficient to say that, from the writ and declaration, it appears that the sum sued for exceeds the amount assessed by the jury. The sum being right in other parts of the record, the omission is cured by the statute, and it is too late after inquisition to take advantage of it.

Per Curiam.—The judgment is affirmed, with three *per cent.* damages and costs. To be certified, &c.

C. W. Ewing and *H. Cooper*, for the plaintiff.

D. H. Colerick, for the defendant.

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*SHERWOOD v. HAMMOND.

ANOTHER ACTION PENDING.—In *February*, 1837, *H.* sued *S.* in the *White* Circuit Court in *assumpsit*. Plea, *non-assumpsit*. On the trial, *S.* offered to prove that in *March*, 1837, he sued *H.* before a justice on two promissory notes; that *H.* proved in that suit, as a set-off, the demand now sued for; that the verdict and judgment being against *H.*, he appealed to the *White* Circuit Court, and that the appeal was still pending. *Held*, that the evidence was inadmissible.

SAME.—The pendency of a subsequent suit can not be pleaded, either in bar or abatement, to a prior suit for the same cause.

APPEAL from the *White* Circuit Court.

DEWEY, J.—*Assumpsit* by *Hammond* against *Sherwood*. Suit commenced in the *White* Circuit Court in *February*, 1837. Plea, the general issue. Judgment for the plaintiff.

On the trial, the plaintiff proved the items of his demand against the defendant, as contained in a bill of particulars. The defendant then offered to prove that in *March*, 1837, he sued the plaintiff before a justice of the peace on two promissory notes, and that, on the trial of that action, the plaintiff in this

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suit, the defendant in that, gave in evidence to the jury, as a set-off, the same matters contained in the bill of particulars; that the jury found against him, and that the justice rendered judgment accordingly; that *Hammond* appealed to the *White* Circuit Court, where the cause was then pending and undetermined. This evidence was objected to, and rejected by the Court. The defendant excepted. The rejection of this testimony raises the only point in the cause.

We think the decision of the Circuit Court was correct. By the appeal from the justice's judgment, both actions were pending in the Circuit Court at the same time. This the elder, and the appeal the younger. Neither was decided. *Hammond*, by attempting to set off his account against the demand of *Sherwood* before the justice, became a *quasi* plaintiff, and we must view the question in the same light as if he had commenced two actions in the Circuit Court for the same cause. The pendency of that which was first commenced might have been pleaded in abatement of the other, but not *e converso*. *Renner v. Marshall*, 1 Wheat., 215. This, however, is not an attempt to abate either of the actions, but to give in evidence under the general issue, the pendency of and [*505] *proceedings in the younger, in bar of the elder action.

This is clearly inadmissible. The *pendency* of even a prior suit can not be set up in defense of another for the same cause: it can only be adduced in evidence under a plea in abatement; 1 Chitt. Pl. 7 *Am.* from 6 *Lond.* ed., 488; nor can it operate in mitigation of damages.

Per Curiam.—The judgment is affirmed with *five per cent.* damages and costs. To be certified, &c.

I. Naylor, for the appellant.

A. S. White, and *R. A. Lockwood*, for the appellee.

 Rubottom and Another v. McClure.

RUBOTTOM and Another v M'CLURE.

WABASH AND ERIE CANAL.—The statute of 1832 respecting the *Wabash and Erie* canal, authorizes the canal commissioners and their agents to enter upon and use any land, and take any materials necessary for the work, without the owner's consent, and without previously making him compensation. The property must be paid for, however, before the title becomes vested in the State.(a)

SAME.—The statute above named, authorizing the appropriation of private property for public use, and providing for a subsequent compensation for the property so applied, is not unconstitutional.

SAME—TRESPASS.—If a defendant in trespass *quare clausum fregit* justify under the above-named statute, the plea need not aver that the commissioners had taken the proper measures to ascertain the damages. If such measures had not been taken, and the failure can avail the plaintiff, it should be replied.

TRESPASS—PLEADING.—If to a declaration in trespass containing several counts, a plea professing to answer the whole declaration only answer one of the counts, and do not aver the identity of the trespasses described in the different counts, it is bad on general demurrer. And such plea, though it contain the averment of identity, is bad on special demurrer.

PRACTICE.—Where there are several issues, they must be all disposed of before the plaintiff can have final judgment.

ERROR to the *Wabash* Circuit Court.

DEWEY, J.—*M'Clure* declared in trespass against *Rubottom* and *Cassatt*. The declaration contains two counts. The first sets out a breach of close, and lays, in aggravation of damages, the cutting down a number of trees, and the taking and carrying away them and a quantity of other timber. The second count is for taking and carrying away other trees.

[*506] *General issue, and three special pleas. Each of the latter professes to answer the whole of the declaration, and avers that the defendants were in the employment of the commissioners of the *Wabash* and *Erie* canal; that they entered upon the close in the first count of the declaration mentioned, for the purpose of procuring materials necessary to the construction of works connected with the *Wabash* and *Erie* canal, and that, in obtaining such materials, they took "the

(a) See *Falkenburgh v. Jones*, 5 Ind., 297; *McCormick, v. The Pres., &c.* 1 Ind., 48; *Hankins, v. Lawrence*, 8 Blackf. 266.

said trees and timber in the said plaintiff's declaration mentioned," doing as little damage as possible; "which are the same trespasses in the declaration mentioned." These pleas vary from each other only in the capacity in which they represent the defendants to have acted under the authority of the canal commissioners.

General demurrer to all the special pleas,—demurrer sustained,—jury of inquiry called,—damages assessed—and final judgment upon the verdict.

In support of the demurrer, it is contended that the statute upon which the pleas are founded is unconstitutional, and affords no protection to the defendants for entering upon the land of the plaintiff for the purposes declared in the pleas. But in what its unconstitutionality consists, or what are the arguments to sustain the objection, we are not informed.

It is presumed that, at the present day, no one will question the right of the legislature to apply the property of individuals to public use, when "urgent necessity" or "the general interest" may require it. Chancellor *Kent*, in the 2 vol. 2 ed. of his commentaries, p. 339, says,—“The right of eminent domain, or inherent sovereign power, it is admitted by all publicists, gives to the legislature the control of private property for public uses, and for public uses only.” And to his own high authority, and those he quotes, may be added that of *Blackstone*. 1 Comm. 139. Whether this right is subject to any restrictions by the common law, or the law of nations, (and it probably is), need not be examined on the present occasion. With us there is no doubt on the subject. Our constitution requires, “That no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefor.”

[*507] *It becomes necessary to inquire whether the statute in question (Acts of 1832, p. 3), was passed in violation of this restriction.

The 9th section (which is the part applicable to this case) provides—“That it shall and may be lawful for said canal

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commissioners, or each of them, or any of their agents, superintendents, engineers, or workmen acting under them, to enter upon and take possession of, and use, all and singular any lands, waters, streams, and timber, stone, or materials, of any kind, necessary for the prosecution of the improvements contemplated by this act; and to make all such canals, feeders, dikes, locks, dams, and other works, as they may think proper in said prosecution, doing, however, no unnecessary damage."

After authorizing the commissioners to take grants of such lands or materials as might be required, the section proceeds—"And in case any lands, &c., taken and appropriated for any of the purposes aforesaid, shall not be given or granted to this State, or in case the owner or owners thereof shall be *feme covert*, under age, *non compos*, or out of the State or county, on application of said canal commissioners, or either of them, to any justice of the peace of the county in which such lands be, the said justice shall issue his warrant to the sheriff of the county to summon a jury of twelve inhabitants of the county," &c. The jury is to estimate the damage done to any one by the loss of his land or materials; their inquisition returned to the Circuit Court, and final action being had there upon the question of damages, the statute further enacts—"And upon the payment by the said canal commissioners of the damages so assessed by said inquisition, (which valuation shall be conclusive on all persons), which said commissioners are hereby directed to make, the fee-simple of the premises, or the right of such water, stream, or materials, shall be vested in the State."

Without resorting to that liberality of construction which would be justified in interpreting a law, having, like this, for its object the advancement of the wealth, prosperity, and character of a State, there is no difficulty in arriving at the meaning of the language just quoted.

The statute clearly authorizes the canal commissioners and their agents to enter upon and use any land, and take any materials, necessary to the prosecution of the great
 [*508] work *intrusted to their care, with or without the

consent of the owner, and without having previously made compensation. But it also insures to any individual, whose interest may have been made to yield to the public good, remuneration for his loss. Actual payment to him is a condition precedent to the investment of the title to the property in the State, but not to the appropriation of it to public use.

The next inquiry is, does this provision for an after compensation for property thus taken, comply with the restriction in the constitution on this subject?

Not only our own statutes respecting railroads and canals, but the laws of several other States whose constitutions contain the restricting clause in relation to compensation, abound with instances of similar legislation. In *Massachusetts*, *New York*, and *Pennsylvania*, to say nothing of other States, such statutes have been passed and are now existing laws. Indeed, our own statutes regulating the location and opening of highways, both under the territorial government and ever since we became a State, have embraced the same principle. They contemplate that individual property—even cultivated fields—may be entered upon by the proper agents for the purpose of viewing, locating, and marking routes for public roads, without the consent of the owner, and without previous compensation. Now this is, in principle, if not in degree, as much an exercise of the right of eminent domain, as the actual and final appropriation of the property to the public use. But our highway laws go further; a road under them may be really opened and traveled by all passengers before the actual payment of compensation. R. C., 1831. Yet the constitutionality of these laws has never been questioned.

Indeed, if such laws be not valid, the unquestionable right inherent in every sovereign power of applying private property to public use—the spirit of the social compact, that individual interest must bow to public good, in many instances, would be of little service to the community. In the construction and preservation of canals, locks, dams, levees, and other improvements, accidents from various causes which no human sagacity could foresee, and no human power prevent,

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are continually occurring. To repair injuries arising from these causes, and to check the progress of destruction, instant exertion is necessary. If, in such emergencies, nothing [*509] could be done *until a bargain could be made for materials, or their value ascertained by the slow process of appraisement, the right of the public to promote the general welfare by the use of private property, would be, indeed, but a crippled and feeble prerogative.

For these and other reasons which might be urged, we conclude that a statute of this State, which authorizes the appropriation of private property for the public benefit, and provides for a subsequent compensation for property so applied, is constitutional. The statute under consideration is of this character, and therefore valid.

The same decision upon similar statutes has been repeatedly made in *New York*, both in her Courts of law and chancery. And it has been more than doubted by the Courts of that State whether a statute authorizing public agents to use private property for the public good, would not be valid even without making any provision for compensation. This point, however, is not under our consideration. *Bradshaw v. Rodgers*, 20 Johns., 103, 735; *Jerome v. Ross*, 7 Johns. C. R., 344; *Whelock v. Young et al.*, 4 Wend., 647; *Beekman v. The Saratoga, &c.*, 3 Paige, 45; *Bloodgood v. The Mohawk, &c.*, 14 Wend., 51.

Whether the mode of estimating damages pointed out by the statute under consideration, is the most just and judicious which could have been devised, is not for us to decide. It certainly contemplates the first step in the process to be taken by the canal commissioners, and neither prescribes the time within which it shall be taken, nor puts it in the power of the injured person to hasten it. What would have been the effect of unreasonable delay on the part of the commissioners, it is now unnecessary to determine, because no such delay is shown by the pleadings, and because before the commencement of this suit the statute of 1835 (Acts of 1835, p. 26), was passed, which placed it in the power of the complaining party to move first in procuring compensation.

It is proper for us to remark, that the special pleas are not defective for not setting forth that the commissioners had taken the measures ordained by the statute of 1832, to ascertain the damages which the plaintiff had sustained. Could that matter have availed the plaintiff (if in fact it existed) it should have been shown by the replication. This point has also been decided in *New York*. 14 Wend., 51.

[*510] *The view we have taken of that branch of the clause of the constitution, which relates to compensation, renders it unnecessary that we should notice the other branch, which has reference to the consent of the representative.

Though we see no ground on which to question the validity of the statute on which the special pleas are founded, these pleas are still substantially defective, and the demurrer was properly sustained.

In actions of trespass, when the declaration contains several counts supposed to be for the same injury, it is usual, in order to avoid the necessity of pleading separately to each count, so to frame one plea as to make it applicable to all the counts. The manner of doing this is to enumerate in the introductory part of the plea all the trespasses complained of, and after the statement of *actio non*, &c., to allege that the cause of action mentioned in the first and every other count, specifying that contained in each, is the same cause of action, and not other or different; after which follows the justification. 1 Chitt. Pl., 6 *Am.* from 5 *Lond.* ed., 587; 3 *Id.*, 7 *Am.* from 6 *Lond.* ed., 1063, 1064. But a plea even in this form is bad on special demurrer; and when the plaintiff chooses to enforce his right, he can compel the defendant to plead separately to each count. 1 Chitt. Pl., 6 *Am.* from 5 *Lond.* ed., 450, 451; *Edmonds v. Walter et al.*, 2 Chitt. R., 291. The pleas, in this case, contain no averment of the identity of the cause of action set out in the different counts of the declaration. The consequence is, that though they profess to answer the whole declaration, they only justify the trespass alleged in the first count, and leave that in the second unanswered. They are bad, therefore, upon general demurrer. 1 *Saund.*, 28, n. 3; *Gould's Pl.*, 358.

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An error was, however, inadvertently committed, which must reverse this judgment. The general issue was overlooked, and a jury of inquiry called, without regard to it. *Meylin v. Woodford*, 1 Blackf., 286.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the general issue set aside, with costs. Cause remanded, &c.

H. Cooper and J. L. Jernegan, for the plaintiffs.

D. H. Colerick, for the defendant.

[*511] *CUTSHAW v. BIRGE and Another.

SPECIAL BAIL.—It is no defense to a suit against special bail, when sued on their recognizance, that the proceedings against their principal are erroneous.

ERROR to the *Jackson Circuit Court*.

BLACKFORD, J.—*Scire facias* against the defendants on their recognizance as special bail. Judgment by default against *Birge*. *Fislar* pleaded two pleas: 1st. That there was no judge's order for bail indorsed on the writ in the suit against the principal, nor was the action founded on a written contract. 2d. That in the action against the principal, there was not a sufficient affidavit to hold him to bail, nor was there a judge's order for bail, nor was the action founded on a written contract. General demurrer to these pleas, and judgment for the defendant.

This judgment in favour of *Fislar* is erroneous. The pleas are evidently bad. The special bail, when sued on their recognizance, can not defeat the suit by showing the proceedings in the action against their principal to be erroneous. The bail are concluded by the judgment against the principal. *Lewis v. Brackenridge*, May term, 1821.

DEWEY, J., having been concerned as counsel, was absent.

Cain v. The State.

Per Curiam.—The judgment in favour of *Fislar* is reversed, and the proceedings, as respects him subsequent to the joinder in demurrer, set aside, with costs. Cause remanded, &c.

A. C. Griffith, for the plaintiff.

ABEL v. BURGETT, in Error.

A DEFENDANT, having appealed from the judgment of a justice, filed in the Circuit Court two special pleas in bar, upon which issues were joined. Verdict and judgment for the defendant. The judgment was reversed by the Supreme Court, and the cause remanded for another trial. Afterwards, the plaintiff moved the Circuit Court to reject the pleas, [*512] *because they were not filed until after the appeal, but the motion was overruled. He also moved to dismiss the appeal, on the ground that the justice had not filed the papers in time.(1) This motion was also overruled. *Held*, that the motions were made too late, and were therefore correctly overruled.

DEWEY, J., having been concerned as counsel, was absent.

(1) *Vide* note to *Dougherty v. Mason*, *ante*, p. 432.

CAIN v. THE STATE.

INDICTMENT, AMENDMENT OF.—An indictment concluding “against the peace of the State,” may be so amended by the prosecuting attorney, with leave of the Court, as to read “against the peace and dignity of the State.”

ERROR to the *Daviess* Circuit Court. Indictment for keeping a disorderly house, &c., and judgment for the State.

SULLIVAN, J.—The indictment in this case, as it was returned by the grand jury, did not conclude “against the

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peace and dignity of the State." The *contra dignitatem* was omitted. Before the defendant was arraigned, the prosecuting attorney moved the Court to insert the omitted words. The defendant objected, but the Court overruled the objection, and permitted the amendment to be made.

The indictment, as it was returned, was undoubtedly insufficient; but the question is, whether the Court was authorized to amend it, so as to make the conclusion of the indictment conform to the requisition of the constitution?

There is no doubt but that the Court, by the consent of the grand jury, may amend indictments in matters of form. They may be amended in any case where an amendment was allowable at common law. In this respect, there is no difference between civil and criminal cases. The settled practice, when an indictment is returned into Court, is to obtain the consent of the grand jury, that the Court may amend it in matters of form, not altering the substance.

The words with which the constitution requires all indictments to conclude, are words of form. The facts are [*513] found *by the jury on their oath, but the conclusion is affixed by law. The grand jury have nothing to do with finding that conclusion, nor does the constitution require that it should be found by the grand jury. The amendment made in this case did not hinder, delay, or embarrass the defendant, nor did it deprive him of any just means of defense.

We think the Court did right in permitting the amendment to be made, and that the judgment of the Circuit Court should be affirmed. 1 Ch. Cr. Law, 297, 8, and the authorities cited. 1 Saund. R. 249, note 1.

Per Curiam.—The judgment is affirmed with costs.

J. Law, for the plaintiff.

W. Quarles, for the State.

The President and Directors of the Commonwealth's Bank, etc., v. Dunn.

THE PRESIDENT AND DIRECTORS OF THE COMMONWEALTH'S
BANK OF KENTUCKY v. DUNN.

SCIRE FACIAS.—*Scire facias* to have execution on the transcript of a justice's judgment filed in the Circuit Court. *Held*, that error in the judgment was no defense. *Held*, also that *oyer* of the transcript was not demandable.

APPEAL from the *Marion* Circuit Court.

SULLIVAN, J.—On the 17th of *September*, 1837, the plaintiffs obtained a judgment against the defendant before a justice of the peace, on which execution issued and was returned "no property found whereon to levy." A certified transcript of the judgment and proceedings was thereupon forwarded to the clerk of the Circuit Court, which was regularly entered on the docket and order-book of the Court, and a *scire facias* was issued thereon requiring the defendant to appear and show cause, why execution should not issue against his goods and chattels, lands and tenements.

The defendant appeared and craved *oyer* of the transcript on which the writ issued, which was refused by the Court. He then pleaded, 1st, *Nul tiel corporation*; 2d, That the only cause of action filed with the justice who rendered the judgment on which execution is now sought, was a transcript from the records of the *Henry* Circuit Court in *Kentucky*, [*514] and *that the justice proceeded against the defendant by *sci. fa.*, &c.; 3d, *Nul tiel record*.

To the first and third pleas the plaintiffs replied, and demurred to the second. The Court overruled the demurrer and gave final judgment for the defendant, from which the plaintiffs have appealed to this Court. The main point for our consideration on this record is, whether the defense set up in the second plea is a bar to the present action. We think it is not, and that the demurrer to the plea ought to have been sustained. The ground assumed in that plea is, that the justice of the peace erred in proceeding by *scire facias* on a record from the State of *Kentucky*. This may have been

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irregular, but the defendant should have taken advantage of that error before the justice, or if there had been no appearance before him, on appeal to the Circuit Court. By not doing so, he acquiesced in the judgment, and until it is reversed or set aside, it is conclusive between the parties. The proceedings and judgment of the justice can not be examined in this collateral way. He had jurisdiction of the person and subject-matter, and however erroneous his decision may have been, it must stand until reversed by due course of law. This principle is recognized by all the authorities.

The Court did right in refusing the application of the defendant for *oyer* of the transcript, upon the principle that *oyer* is not demandable of a record. 1 Chitt. Pl. 415.—*Cone v. Cotton*, 2 Blackf. 82.(1)

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. Fletcher and *O. Butler*, for the appellants.

H. Brown, for the appellee.

(1) *Oyer* is usually granted of deeds, probates, letters of administration, &c.; but not of records, private statutes, recognizances, letters patent, &c. If a record, however, of the *same* Court be pleaded, the opposite party may demand a note of the term, number of the roll, &c., of the judgment. Stev. Pl., 69.; 1 Chitt. Pl., 465. In case of private writings not under seal, an order for an inspection and a copy may be obtained. *Ib. Pumphrey v. Coleman*, Vol. 1, of these Rep. 199.

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*PETERS v. GOOCH.

DEMAND.—A suit for the non-delivery of goods was held not to lie; the conditions on which the delivery was to have been made not having been complied with.

MONEY HAD AND RECEIVED.—A count for money had and received is not maintainable if the contract on which the money was received has been in part performed, and the plaintiff has derived some benefit, unless the parties can be placed, by a recovery, in the same situation in which they were before the contract.(a)

(a) See *Galling v. Newell*, 9 Ind., 572.

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APPEAL from the *Morgan* Circuit Court.

BLACKFORD, J.—Assumpsit by *Gooch* against *Peters*. The declaration contains two counts. The first states, that on the 1st of *October*, 1835, the parties made the following contract: The defendant undertook to sell and deliver to the plaintiff eighteen hogs and 800 bushels of corn. The hogs were to be immediately delivered, and the corn was to be delivered in a pen on the defendant's farm, in a convenient time to be put into a boat, when a certain river should be high enough for boating. In consideration of the premises, the plaintiff agreed to pay to the defendant fifty dollars in hand, fifty dollars on the 25th of the next *December*, and, upon the delivery of the corn, he was to give his note, with surety, to the defendant for \$110, payable on the first of the next *June*. It is then averred that the plaintiff paid the fifty dollars in hand and the other fifty dollars on the 25th of the next *December*, and also that he received the hogs from the defendant. It is further averred that on the — day of *March*, 1836, when the river, for the first time after the contract, became high enough for boating, the plaintiff went to the defendant's house on said farm and demanded the corn of him, and offered to execute the note with surety for the \$110; but that the defendant refused to receive the note or to deliver the corn. The second count is for money had and received by the defendant for the use of the plaintiff.

Pleas, first, non-assumpsit; second, to the first count, that at the time and place, &c., the defendant had the corn ready and tendered and offered to deliver it to the plaintiff; but that he refused to receive it. Issues were joined upon both the pleas.

Verdict in favour of the plaintiff for fifty-three dollars. [*516] A motion *made by the defendant for a new trial was overruled, and a judgment rendered on the verdict.

The record contains the evidence which was given in the cause; and the error assigned is, that the verdict is contrary to the evidence.

It is very clear that the evidence does not sustain the verdict, and that the defendant was entitled to a new trial. To

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establish the first count, it was necessary to prove a demand of the corn at the proper time and place, and the execution of the note for the \$110; but there is not the slightest evidence as to these matters. There could be no recovery, therefore, on the first count.

There is also a fatal objection to a recovery on the common count. The evidence shows that the plaintiff had received the hogs from the defendant, as is alleged in the special count, and that the contract had been thus in part performed. It was further proved that the plaintiff had sold the greater part of the hogs. The plaintiff's recovery, therefore, of the money advanced on the contract for the hogs and the corn, which appears by the evidence to have been an entire contract, could not place the parties in the same situation in which they were at the time the contract was made. The consequence is, that the count for money had and received was not sustainable. The following is the language of *Chitty* on this subject: "The count for money had and received is not maintainable, if a contract has been in part performed, and the plaintiff has derived some benefit, and by recovering a verdict the parties can not be placed in the exact situation in which they originally were when the contract was entered into." 1 Chitt. Pl., 388.

Per Curiam.—The judgment is reversed and the verdict set aside with costs. Cause remanded, &c.

H. Brown and C. C. Nave, for the appellant.

P. Sweetser, for the appellee.

[*517] *RHODEN v. GRAHAM, in Error.

DISSEISIN. Pleas, 1. Not guilty; 2. A denial of the defendant's possession. The second plea was rejected as amounting to the general issue. The cause was submitted to the Court. Judgment for the plaintiff. Errors assigned:

 Blann v. Smith.

1. There was no proof of the defendant's possession; 2. The second plea should not have been rejected. *Held*, that as there was evidence from which the Court might reasonably infer that the defendant had possession, and was determined to hold it against the will of the plaintiff, who was admitted to be the owner—the first objection was without foundation. *Held*, also, that the second plea was correctly rejected. *Sinard v. Patterson*, 3 Blackf., 355. See 8 Blackf., 185.

WICKHAM v. BAKER, in Error.

DECLARATION in slander containing two counts. Judgment by default, entire damages assessed by a jury, and final judgment accordingly. Errors assigned: 1. One of the counts is bad. 2. There is no sufficient venue in the declaration. *Held*, that it was too late to make the first objection. R. C., 1831, p. 409. (R. S., 1838, p. 454.) *Held*, also, that the second objection was made too late. See 8 Blackf., 523, 7 Ind., 169.

BLANN v. SMITH.

TITLE-BOND—WANT OF TITLE IN OBLIGOR.—If the obligor of a title-bond had no title to the premises at the time the deed was to be executed, the obligee may sue on the bond without having demanded the deed.(a)

ERROR to the *Sullivan* Circuit Court.

DEWEY, J.—Debt on a penal bond. The defendant below craved *oyer* of the bond and condition. The latter is, [*518] that *the former should be void, provided the defendant conveyed to the plaintiff, on or before a specified

(a) *Bowen v. Jackson*, 8 Blackf., 203; *Carpenter v. Lockhart*, 1 Ind., 434; *Mix v. Ellsworth*, 5 Ind., 517

Fisher v. Bridges.

time, the title in fee-simple, by deed of special warranty, to a certain tract of land. Plea, readiness to perform by conveying title according to the condition of the bond. Replication, that at the time when by the condition the title should have been conveyed to the plaintiff, the defendant had no title in fee-simple to the land, and that he has never since had such a title, and that he could not, at the time specified in the condition, nor at any-time since, execute a deed conveying a title in fee-simple. General demurrer to the replication and joinder. The Court overruled the demurrer, and rendered final judgment for the plaintiff on the verdict of a jury of inquiry.

We think the replication assigns a sufficient breach, and that the demurrer was correctly overruled. To say that the defendant had no title, and could not convey one, is surely equivalent to saying that he did not convey a title. Besides, this manner of assigning the breach was proper in this case, because it shows an excuse for not demanding the deed before suit. The utter inability of the defendant to convey, dispensed with the necessity of the demand, as the law does not require a vain or nugatory thing to be done.

Per Curiam.—The judgment is affirmed, with costs. To be certified, &c.

S. Judah, for the plaintiff.

D. M'Donald, for the defendant.

FISHER v. BRIDGES.

TRESPASS FOR ASSAULT, ETC.—PLEADING.—If in trespass for an assault and battery, *son assault demesne* be pleaded, the plaintiff may, under the replication of *de injuria*, &c., prove that the defendant's battery was *excessive*.^(a)

NEW TRIAL—COSTS.—The party against whom erroneous instructions to the jury are given, is entitled to a new trial without the payment of costs.

ERROR to the *Marion Circuit Court*.

^(a) *Philbrick v. Foster*, 4 Ind., 412.

BLACKFORD, J.—The plaintiff in error brought an action of trespass for an assault and battery against the [519] defendant in *error. Plea, *son assault demesne*.

Replication *de injuria*, &c. Verdict for the defendant. The plaintiff moved for a new trial, which the Court refused to grant, except upon the payment of costs. The plaintiff refused to accept the new trial on the terms proposed, and judgment was rendered against him on the verdict.

On the trial, the plaintiff asked the Court to instruct the jury that, if the assault and battery were *excessive* and outrageous, they must find for the plaintiff. This instruction the Court refused, on the ground that the *excess* should have been replied.

The question raised in this case is, whether, when an excessive battery is relied on in order to avoid the plea of *son assault demesne*, it is necessary to reply the excess?

There are several respectable authorities on both sides of this question, but we believe that the weight of the decided cases is in favour of admitting the excess to be proved without a special replication. In *Hannen v. Edes*, 15 Mass., 347, the subject is fully discussed, and the decision there is that the excess need not be replied. In the last edition of *Chitty's Pleading*, the following language is used: "If *son assault demesne* has been pleaded, and the evidence will establish that the defendant's battery of the plaintiff was *excessive*, and more than was necessary for self-defense, it seems that according to the latest decisions the plaintiff may, under *de injuria*, and without a special replication or new assignment, give in evidence the excess." 1 Chitt. Pl., 6 Lond. ed., 661.(1)

It is our opinion, that it was not essential to the plaintiff's recovery in this case, that the excessive battery which he relied on, should have been specially replied.

We consider that the refusal of the Court to give the instruction asked for by the plaintiff, rendered the proceedings erroneous, and that the plaintiff was, in consequence of that mistake of the Court, entitled to a new trial without the payment of costs.

Forsha v. Watkins.

Per Curiam.—The judgment is reversed and the verdict set aside with costs. Cause remanded, &c.

J. Morrison and *W. Quarles*, for the plaintiff.

C. Fletcher and *O. Butler*, for the defendant.

[*520] *(1) But in trespass *quare clausum fregit*, if the plea justify the gist of the action, and the plaintiff wish to prove that the defendant exceeded the right or authority alleged in his plea, the *excess* must be specially replied. *West et al. v. Blake*, ante, p. 234.

FORSHA v. WATKINS.

JURISDICTION.—A justice of the peace has no jurisdiction in an action of debt, or on the case, against a constable for an escape, if the demand exceed fifty dollars.

APPEAL from the *Wayne* Circuit Court.

BLACKFORD, J.—An action of debt was brought before a justice of the peace, by *Watkins* against *Forsha* for an escape. Demand, sixty-four dollars.

The declaration, filed before the justice, states that the plaintiff had recovered a judgment against one *Ballard*, before a justice, for the sum of sixty-four dollars; that a *capias ad satisfaciendum* was issued on the judgment; that *Forsha*, as a constable arrested *Ballard* on the execution, and afterwards suffered him to escape. Plea, *nil debet*. Judgment by the justice for the defendant. Appeal to the Circuit Court, and judgment there in favour of the plaintiff for the sum of sixty-four dollars.

There is an objection to this action which meets us on the threshold, and which must prove fatal to the plaintiff's recovery. It is an objection to the jurisdiction of the justice, in consequence of the nature of the complaint and the amount of the demand.

The statute of 1831 enacts that the jurisdiction of a justice, in actions of debt and assumpsit, shall extend to \$100, in all

other actions founded on contract to fifty dollars, and in all actions founded on tort to twenty dollars. R. C., 1831, p. 297. And the statute of 1834 extends the jurisdiction in replevin, trespass *vi et armis*, and case, to fifty dollars. Stat. 1834, p. 156.

It appears, by these statutory provisions, that a justice has no jurisdiction of actions founded on *tort*, when the demand exceeds fifty dollars. The suit before us, it is true, [*521] is in name *an action of debt, and it is also true, that actions of debt are generally founded upon contract. They are not, however, always so founded; and the present case may be considered as one of the exceptions to the rule. It is certainly not necessary, in order to sustain the suit, that any contract should be shown to have been made by the officer and the plaintiff. It is the misbehaviour of the officer, in suffering the execution-defendant to escape, which is to be proved. The *gravamen* of the action, therefore, is not a breach of contract, but a *tort*, notwithstanding the suit be in form *ex contractu*; and the jurisdiction of the justice, in the case before us, must be determined by the nature of the complaint, and not by the mere name of the action.

The following cases will show, in some degree, the correctness of this opinion. It is decided, in an action of debt against the executor of a sheriff for an escape suffered by the testator, that the action was founded *in maleficio* and could not therefore be sustained. The Court considered that the circumstance that the action was debt, made no difference, but that as it was for a *tort*, the rule *actio personalis moritur cum persona* applied to the case. *Whitacres v. Onsley et al.* 3 Dyer's Rep. 322; 1 Chitt. Pl. 6 Lond. ed. pp. 102, 103. It is also decided, that the provision in the *English* statute of limitations, which limits the bringing of actions of debt grounded on any lending or contract to six years, does not apply to an action of debt against a sheriff for an escape. One reason given for this decision is, that although the action is in form *ex contractu*, it is in reality an action of *tort*. *Jones v. Pope*, 1 Saund. Rep. 34.

According to these cases, the action of debt for an escape,

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so far as respects the liability of the sheriff's executor, and as respects the clause in the *English* statute of limitations as to actions of debt, is considered and treated as an action founded on *tort*. And so, in analogy to those cases, the action of debt for an escape may be considered, as regards the jurisdiction of justices of the peace, to be governed by the law that regulates actions which arise *ex delicto*.

This action of debt for an escape, therefore, being founded on *tort*, and a justice having no jurisdiction in any action of *tort* for so large an amount as this plaintiff demands, our opinion is that the justice had no jurisdiction of the present suit.

It is obvious, that the jurisdiction of a justice in [*522] actions on *the case* for an escape, is limited by the statute to fifty dollars; and we think that the reason of that limitation, whatever it may be, is as applicable to the action of debt for an escape as it is to the action on the case. The legislature has not, in terms, made any distinction in the two cases, as to the justice's jurisdiction, and we do not believe that any such distinction was intended.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Rariden, J. S. Newman, C. H. Test, and J. B. Ray for the appellant.

J. Perry, for the appellee.

BOWSER and another v. WARREN.

LAND PATENT EVIDENCE.—A patent for *United States* land which appears to be signed by the president, countersigned by the commissioner of the general land office, and verified by the seal of that office, is admissible as evidence without proof of its execution.

DEED—EVIDENCE.—A deed with subscribing witnesses is not admissible in evidence on proof of the grantor's hand-writing, unless the absence of the

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witnesses be accounted for, and due diligence have been used, without effect, to procure proof of their hand-writing.(a)

SAME.—A conveyance of real estate, purporting to be executed to the party offering it in evidence, is not admissible, though it appear to have been acknowledged and recorded, unless its execution be proved.(b)

DISSEISIN.—In an action of disseisin, it is not necessary to prove a notice to quit or a demand of possession, if there be no privity between the parties.(c)

APPEAL from the *Morgan* Circuit Court.

DEWEY, J.—This was an action of disseisin. Verdict and judgment for *Warren* the plaintiff below.

On the trial in the Circuit Court, the plaintiff offered in evidence to the jury a patent from the *United States* for the premises in controversy. The patent appears to be signed by the president, countersigned by the commissioner of the general land office, and verified by the seal of that office. No extrinsic evidence of its execution was adduced. The [*523] defendants *objected to its admissibility, but their objection was overruled and the patent was given in evidence. This is assigned as error.

We think the decision of the Circuit Court is correct. In the case of *Harris v. Doe*, dem. *Barnett et al.*, at the last term of this Court, we held that the seal of the general land office is a public seal, and stands on the footing of the seal of a court of record. In this character it implies verity, and is, of itself, sufficient proof of the due execution of any instrument to which the law requires its annexation.

The plaintiff also produced, and offered in evidence, a deed purporting to be executed by one *Ferguson*, and to be attested by two witnesses, conveying the litigated land to the plaintiff. At the time of presenting the deed, he proved that about two years before the trial, he had sent an agent (the witness who testified to the fact) to *Danville*, in *Vermillion* county, *Illinois*, to purchase the land described in the deed of *Ferguson*. The bargain was made and the land paid for; a draft of the deed was made in the witness' presence, and, afterwards, on the

(a) *The State v. Bodly*, 7 Blackf., 355; Id., 176

(b) *Doe v. Vandervater*, 7 Blackf., 6; 6 Id., 143, 450; 5 Id., 319, 78.

(c) *Allen v. Smith*, 6 Blackf., 527.

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same day, when next he saw it, the deed was delivered to him at *Danville*, by *Ferguson*, with the names of the grantor and witnesses as it then appeared in Court. The witness knew nothing of the persons or residence of the subscribing witnesses. The plaintiff then offered, by another witness, to prove the hand-writing of *Ferguson*. The testimony was objected to, but the proof was made, and the deed given in evidence to the jury. The deed appeared to be duly acknowledged and recorded.

Two questions here present themselves. Was proof of the hand-writing of the grantor legal evidence of the execution of the deed? And if not, did the acknowledgment and recording of the deed supersede the necessity of other proof of its execution?

The rules of evidence involved in the first inquiry are well established. They are these: The execution of written instruments purporting to be attested by witnesses, when denied in a court of justice, must be proved by at least one of the subscribing witnesses, if such witness can be had. When all the attesting witnesses are dead, resident in a foreign State, not to be found after diligent search and inquiry, kept out of the way

by the adverse party, or are incapacitated from giving [*524] *testimony, resort may be had to secondary evidence—the highest kind of which is the proof of the hand-writing of the subscribing witnesses, or of one of them. If such proof, after diligent search and inquiry, is found to be impracticable, evidence of the hand-writing of the person executing the instrument may be given, or his signature may be established by any person who happened to see it subscribed.

Proof of the execution in any one of the above modes in the order stated, is sufficient and needs no corroboration. *Barnes v. Trompowsky*, 7 T. R., 261; *Call v. Dunning*, 4 East, 53; *Cunliff v. Sefton*, 2 East, 183; *Adam v. Kers*, 1 B. & P., 360; *Sluby v. Champlin*, 4 Johns., 461; *Crosby v. Percy*, 1 Camp., 303; *Clark's Lessee v. Courtney et al.*, 5 Peters, 319; 2 Blackf. 91, n. 1 and 2; 1 Ib., 47, and notes; *Wylde et al. v. Porter*, 1

Ad. & Ell., 742. We do not mean to say, however, that the above rules are applicable to every case—such, for instance, as instruments produced under notice, the party producing claiming an interest under them, registered or enrolled deeds under certain circumstances, deeds which a party has acknowledged under seal, ancient deed, sinstruments, the subscribing witness to which was incompetent at the time of attestation and trial, and deeds, the execution of which is denied by the subscribing witness.

We are aware that the rule that the testimony of the subscribing witness is the best evidence of the execution of an instrument which the nature of the case will admit of, has been said, sometimes, not to be founded in good reason. But when we reflect, that at a very early stage of *English* jurisprudence, the witnesses attesting a deed were selected from the best men in the neighbourhood, and their names registered in the body of the deed; that when the deed was denied in Court, these witnesses necessarily constituted a part of the jury; that long after the latter feature of the law was dropped in the reign of *Edward II.*, down to the time of *Henry VIII.*, the witnesses were brought into court by the same process which procured the attendance of the jury, we can not be surprised at the adoption of the rule, nor that it was supposed to rest on the agreement of the parties, that the fact of the execution of the deed should depend upon the testimony of the persons thus selected to attest it. 1 Stark. Ev. 5 *Am.* from new Eng. ed. 5, note *e.*; 3 Johns, 479. However this matter [*525] may be, *the law with the limitations as stated before, is now too firmly settled to be questioned.

The real difficulty, in this case, consists in determining whether the facts shown by the record are sufficient not only to excuse the absence of the subscribing witnesses, but to dispense also with proof of their hand-writing.

Of the cases in which secondary evidence has been admitted, without clear proof to explain the absence of the subscribing witnesses, *Wallace v. Delancey*, 7 T R., 262, *n.*, and *Jackson dem. Livingston et al. v. Burton*, 11 Johns., 64, are the strongest.

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The former was the case of a bond of sixteen years' standing, executed in *New York*. It appeared that *Rivington*, one of the subscribing witnesses, was resident in *New York* at the time of the trial, and his hand-writing was proved. It was also proved that a person of the same surname of the other subscribing witness had been living with *Rivington* in *America*, as his clerk, but he was not identified with the witness, nor was it shown that he was not in *England* at the time of the trial. Lord *Kenyon*, admitting the evidence not to be as perfect as it might have been, suffered the bond to go to the jury.

The case reported in *Johnson* related to the proof of a deed forty-four years old. It had two subscribing witnesses. One was proved to be dead, and his hand-writing was sworn to. The witness who stated these facts, testified that he had lived in the city of *New York* (where the deed was executed) before and since the date of it, but knew nothing of the other subscribing witness. Chief Justice *Kent* considered this fact, taken in connection with the great changes in the population of *New York*, which had been wrought by the revolution since the date of the deed, as sufficient to raise a fair presumption that the testimony of the subscribing witness could not be obtained. The expression which he used, that "the rules and practice of Courts leave this point with some latitude of discretion," had relation to the strength of the proof required to account for the absence of a subscribing witness, and not to the right of a Court to dispense with his absence without a sufficient explanation.

It should be remarked that, in these cases, the hand-writing of one of the subscribing witnesses was proved. That was sufficient after having accounted for the absence of both.

*526] *But in the case before us no proof was given, or offered, of the hand-writing of either of the witnesses.

If we admit that their absence was sufficiently explained by the fact that their names were on the deed when it was delivered in *Illinois*, two years before the trial, to admit proof of their hand-writing, we can go no further. It would by no means

follow that the plaintiff could not have proved their hand-writing by proper diligence. There is as much reason to suppose that *Ferguson* lived in *Illinois* as that the witnesses lived there. Yet the plaintiff did actually prove his hand-writing.

A little inquiry might have led to information that these witnesses had emigrated from this State—an event not at all improbable—and thus the plaintiff might have found persons within the jurisdiction of the Circuit Court acquainted with their autograph. Besides, *Danville*, in *Illinois*, lies within a few miles of our State line. If the witnesses lived there, and they must be presumed to have lived there to justify their absence, testimony of their hand-writing might have been sought for almost in their very neighborhood, without leaving our jurisdiction. We do not mean, however, to prescribe the exact mode in which the plaintiff should have exercised diligence. We only say, some attempt to procure testimony of the hand-writing of these witnesses, or at least of one of them, was necessary, in order to let in proof of the hand-writing of the grantor, *Ferguson*. The remissness of the plaintiff in this respect is not only inferable from what the record does not show, but the carelessness of his agent is positively proved. He received the deed for his principal without availing himself of the opportunity, which was in his power, of gaining some information respecting the attesting witnesses to it.

The case of *Barnes v. Trompowsky*, *supra*, is directly in point to the question which we are now considering. In that case, the residence of the subscribing witness was at *Riga*, in *Russia*, both at the time of attestation and of the trial, yet it was held that proof of his hand-writing could not be dispensed with, no diligence to obtain such proof having been shown. The decision reported by *Peters*, *supra*, has also a strong bearing on this question. The instrument to be proved in that case was a power of attorney, executed at *New York* thirty years before the trial, which took place in *Kentucky*. It

had three attesting witnesses. No further account
[*527] was given *of them, nor was any diligence shown to prove their hand-writing. The Supreme Court of

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the *United States* held, that proof of the hand-writing of the maker of the letter of attorney was illegal.

We conclude, therefore, that the fact that the names of subscribing witnesses were affixed to a deed, which was delivered in *Illinois* near the border of this State, is not, of itself, sufficient to authorize proof of their hand-writing to be dispensed with; and, consequently, that the Circuit Court erred in admitting evidence to prove the hand-writing of the grantor.

It remains to answer the inquiry, whether the acknowledgment and recording of the deed made other proof of its execution unnecessary?

The cases respecting the admissibility of the record or registry of deeds, or the copies of them, without accounting for the absence of the originals or proving their execution, are very numerous and not at all uniform. From a general view of the authorities, we consider the rule of evidence most conducive to convenience in practice, and to the security of titles (excepting perhaps some cases of fraud) to be, that when a deed has been regularly admitted to record in the recorder's office, and is relied upon by a suitor not a party to it, and who can not be presumed, from the nature of the conveyance, to have the custody or control of the instrument, the record, or a copy of it, is *prima facie* evidence, and proves the execution of the deed without other testimony; but if the deed is made to the party who relies upon it, or may be presumed from its character to be in his keeping, or under his control, the original must be produced, if not lost or destroyed, and its execution proved.

A deed duly acknowledged and recorded comes within this rule and is *prima facie* evidence without further proof of its execution, whenever the recorder's record, or a copy of it, would be evidence without the production of the original, and without explaining its absence. *Jackson v. Schoonmaker*, 4 Johns. 161.—*Eaton v. Campbell*, 7 Pick. 10.—*Scanlan v. Wright*, 13 id. 523.

The deed in this case was made immediately to the party

who produced it; he was therefore bound to prove its [*528] execution, *as if it had never been acknowledged and recorded. Its admission was erroneous.

The Court below refused to instruct the jury, that to maintain his action the plaintiff must have proved that he gave the defendants notice to quit, or that he demanded possession. There was no evidence showing any privity between the plaintiff and defendants, or either of them, and the instruction was properly refused.

Exceptions were taken to several other instructions, but as all the principles which they involve have been already considered, no further notice of them is necessary.

Per Curiam.—The judgment is reversed and the verdict set aside with costs. Cause remanded, &c.

H. Brown and *W. Quarles*, for the appellants.

P. Sweetser, for the appellee.

SWEETSER and Others v. THE STATE.

ASSAULT AND BATTERY.—A charge of an assault and battery with intent to kill, is only a charge of an assault and battery; the words “with intent to kill” being surplusage.

APPEAL from the *Bartholomew* Circuit Court.

DEWEY, J.—*Scire facias* on a recognizance, conditioned that *John Glans* should appear at the Circuit Court therein named, to answer “the State on a charge of assault and battery with intent to kill, committed by said *Glans* on the body of one *John F. Jones*.” There was a demurrer to the *scire facias* which was overruled: judgment for the State.

The only objection urged against the *scire facias* is, that the condition of the recognizance does not describe an offense known to our laws; and, therefore, that the recognizance is void.

The inference would be correct were the premises true.

Marvin v. Slaughter, on Appeal.

The words "with intent to kill," certainly do not aggravate the charge, which they were meant to qualify, into a penitentiary offense. To have done that, the intent must have been to "murder." But although these words do not add [*529] to, they *do not destroy the meaning of those which do actually charge a crime—an assault and battery. Legal principles require that they should be rejected as surplusage, rather than suffered to render senseless and void an instrument which is valid without them. This construction is also in the spirit of the statute, which enacts that recognizances shall not be void for want of form. R. C. 1831, p. 197. (R. S. 1838, p. 221.)

Per Curiam.—The judgment is affirmed with 3 *per cent.* damages and costs. To be certified, &c.

P. Sweetser, for the appellants.

W. Quarles, for the State.

MARVIN v. SLAUGHTER, on Appeal.

IN assumpsit by the assignee of a promissory note against the maker, the declaration set out the indorsement as follows: "And the said A (the payee) then and there, under his own proper hand, indorsed and delivered the said promissory note to the plaintiff. By means whereof," &c. Special demurrer to the declaration, because it does not state that the note was *assigned* by indorsement thereon under the hand of the payee. *Held*, that there was no ground for the demurrer. See 6 Blackf., 154.

Tucker v. Tipton.

TUCKER v. TIPTON.

PROMISSORY NOTE—PROOF OF WANT OF CONSIDERATION.—In a suit by the assignee against the maker of a promissory note, not payable and negotiable at a chartered bank, the defendant may prove, under the general issue, a want or failure of the consideration.^(a)

ERROR to the *Cass* Circuit Court.

DEWEY, J.—Assumpsit by the assignee against the maker of a promissory note, not payable and negotiable at a bank in this State. Plea, the general issue. Judgment for the plaintiff.

[*530] *On the trial below, the defendant offered evidence that the note had been given without consideration, or that the consideration had failed. The testimony was rejected by the Court: the defendant excepted. This is the only error assigned.

We see no ground on which the decision of the Circuit Court can be sustained.

At common law, evidence of a total want or failure of consideration, in actions founded upon simple contracts (excepting negotiated bills of exchange), is admissible under the general issue. 2 Stark. Ev., 169, 170; 1 Chitt. Pl., 511; *Sill v. Rood*, 15 Johns., 230. Since the statute of *Anne*, this doctrine is equally applicable to promissory notes in *England*.

In this State such promissory notes only as are made payable and negotiable at a chartered bank in the State, are governed by the law merchant. R. C. 1831, p. 94. Other notes are made assignable by the same statute; but the maker of them is entitled to the same defense, against an assignee, which he might have had against the payee. His common law right to prove entire want or failure of consideration under the general issue, is not impaired by that statute; nor is it affected by the statute authorizing special pleas alleging the want or failure of consideration, entirely or in part, in actions on specialties

(a) See *Comparet v. Johnson*, 6 Blackf., 59.

McNitt, for the use of Babcock v. Hatch.

or other contracts. R. C. 1831, p. 405. This point was decided in the case of *Jamison v. Buckner*, 2 Blackf., 77. We adhere to this decision.

In actions upon simple contracts, not protected by the law merchant, the defendant has a right to give a want or failure of consideration in evidence under the general issue, either against the payee or assignee of the instrument sued on.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the issue set aside with costs. Cause remanded, &c.

I. Naylor and J. W. Wright, for the plaintiff.

H. Chase C. Fletcher and O. Butler, for the defendant.

[*531] *M'NITT, for the use of BABCOCK v. HATCH.

PROMISSORY NOTE, NOT TRANSFERABLE BY DELIVERY.—The legal interest in a promissory note, though payable to bearer, is not transferable by delivery under the statute, unless the note be payable at some chartered bank within the State.^(a)

SAME—PARTY IN INTEREST.—A suit on a promissory note must be brought in the name of the person who has the legal interest in the note.

ERROR to the *Elkhart* Circuit Court.

BLACKFORD, J.—Debt on a promissory note commenced before a justice of the peace. The suit was brought by *Samuel M'Nitt*, for the use of *Thomas J. Babcock*, against *Timothy A. Hatch*. The following cause of action was filed: "Action of debt founded on a note as follows: 'Due *M'Nitt* (meaning the said plaintiff) or bearer thirty-five dollars, nine months from date, for value received. *Mexico*, 10th *May*, 1828.' (Signed by the said defendant by the description of *T. A. Hatch*.) The said *Babcock* is the bearer of the note, and has the beneficial interest in the same. The defendant refuses to pay the note or any part thereof for the use aforesaid. To the

^(a) *Jamison v. Jarrett*, 4 Ind., 187.

McNitt, for the use of Babcock v. Hatch.

damage of the plaintiff, for the use aforesaid, twenty dollars. Hence this suit is brought. *J. A. Liston*, attorney for the plaintiff." Plea, the general issue. The justice gave judgment for the defendant, and the plaintiff appealed to the Circuit Court. Judgment in the Circuit Court for the defendant.

The point decided by the Circuit Court was, that the note did not tend to support the cause of action. This decision is erroneous. The defendant's objection to a recovery is, that as the declaration shows *Babcock* to be the bearer and beneficial owner of the note, the suit should have been in his name. But there is no good ground for this objection. The note being payable to *M'Nitt* or bearer, and the payee not having assigned it by indorsement, we are of opinion that the legal title to it is in *M'Nitt*.

Promissory notes are not negotiable either by indorsement or delivery, according to the common law. By the *English* statute of *Anne*, they are negotiable; and, when payable to bearer, they are, by that statute, transferable by delivery. But that act is not in force here. Our statute on the subject enacts, that promissory notes, payable to any person or persons, shall be assignable by an *indorsement* thereon. [*532] But it *has no expression in it tending to show that any notes are transferable *by delivery*, except such as are payable to bearer, and at some chartered bank within the State. R. C. 1831, p. 93.

The note under consideration was not payable at a chartered bank within the State, and was not therefore transferable by delivery. It follows, that the mere fact that *Babcock* was the *bearer* of the note, did not show that he was the legal owner of it. The legal ownership of the note was in *M'Nitt*, and the suit was therefore correctly brought on it in his name. 1 Chitt. Pl., 2.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. A. Liston and *J. Morrison*, for the plaintiff.

H. Cooper, for the defendant.

Hunt and Wife v. Jordan and Others.

HUNT and WIFE v. JORDAN and Others.

STATUTE OF DESCENTS.—Under the statute of 1831 regulating descents, the widow of a person dying intestate without issue—leaving a father, mother, brothers or sisters or their descendants—is entitled to only \$100 of his personal estate, and one-third of that part of it which remains for distribution.

ERROR to the *Gibson* Probate Court.

DEWEY, J.—*River Jordan* died intestate without issue, leaving a widow, mother, brothers and sisters. His personal property was more than sufficient to pay his debts; administration of his estate was granted; his widow married, and her husband received from the administrator \$100, and also one-third of the personal assets subject to distribution. She and her husband filed their bill in chancery before the Probate Court against the administrator and others, stating the above facts. The object of the bill is to recover all the [*533] personal estate of **River Jordan*, to the exclusion of his mother, brothers and sisters. The defendants demurred; the demurrer was allowed, and the bill dismissed.

The only question presented for our consideration is whether, under the statute of descents, distribution and dower, passed in 1831 (R. C. 207), the widow of a person dying intestate without issue, but leaving a mother, brothers and sisters, is entitled to the whole of his personal estate after the payment of debts.

The first section of that statute provides for the descent and distribution of the real and personal estate of an intestate to his children or their descendants *per stirpes*; saving to the widow her right of dower in all cases. The second section gives the estate, if there be no children or their descendants, to the father; if no father, to the mother, brothers and sisters and their descendants, in equal portions. The third and fourth sections provide for the inheritance of the real estate of a person dying intestate, in certain cases, in the paternal or maternal line of his ancestors agreeably to the origin of the estate. The former of these sections expressly recognizes the

brothers and sisters of the deceased as entitled, next to his issue, to his real estate. The latter has not this provision in words, but its spirit is probably the same. Both these sections are silent as to the wife of the intestate.

The fifth section reads thus: "The real and personal estate of persons dying intestate without issue, having no father or mother, brothers or sisters or descendants thereof, shall be divided into two equal parts, one of which shall go to the paternal, the other to the maternal kindred in the following order: first, to the grandfather, then to the grandmother; and if there be neither, then to uncles and aunts on each side, and their descendants. *Provided*, however, the widow of such person dying intestate and having no issue, shall be entitled to all of his personal estate and to half of his real estate." The sixth section is very obscurely and even ungrammatically expressed; but we understand its meaning to be, that when the intestate leaves neither children nor their descendants, father, mother, brothers or sisters or their descendants, and there is no paternal and maternal kindred to take one-half of the real estate as provided by the fifth section, then the whole of the estate, real and personal, shall go to the wife.

[*534] *Other portions of the statute secure to the wife personal property to the amount of \$100, one-third of the assets subject to distribution, and dower in the real estate.

The complainants found their claim to all the personal estate of the deceased husband of one of them upon the proviso attached to the fifth section. They contend that its operation is such as to exclude the father, mother, brothers and sisters, as well as the grandfathers, grandmothers, uncles, aunts, &c., of a person dying intestate and without issue, from all participation in his personal property, and that it bestows the whole upon his wife.

We do not concur in this construction. To adopt it, would be to disregard that rule of interpretation which requires that to every part of a statute shall be given meaning and consistency, if possible. To adopt it would be, indeed, to say that this proviso repeals the greater portion of the enactments

which precede it, and even renders much of the section, to which it belongs, perfectly senseless. Still, had the Legislature couched it in language clearly expressing their design to demolish, in a great measure, the system of descents and distribution which they had just established, we must have given it that effect. But the phraseology of the proviso itself is ambiguous. The pronoun "such," refers to a class of persons described in the body of the section; the subsequent terms in the proviso, "dying intestate and without issue," constitute a part of that description but not the whole. Hence the doubtful meaning of the proviso. To have made the description in it full, and consistent with the body of the section, as well as with the sense of "*such*," the words "father or mother, brothers or sisters or their descendants," should have followed the phrase, "dying intestate and having no issue." In the statute of 1817 (Acts of 1817, p. 141), and in the R. C. of 1824, p. 155, the description in the provisos to sections similar to that under consideration was perfect, and the present ambiguity did not exist. Had the Legislature, in 1831, designed to make the change in the law, which it is contended this proviso operates, we imagine they would have found a more effectual way of doing it than by adopting the proviso in its present mutilated form. It is evident, we think, that the obscurity [*535] occasioned by omitting *a few words of the statute, which they were revising, is the effect of an inadvertency which was likely to occur, and not of a design scarcely rational.

If any doubt existed as to this matter, it would be entirely dispelled by reference to the sixth section already noticed. The construction which we have given that section, clearly **shows the office of the proviso is only to qualify the provision of the section to which it belongs, so as to give the wife the whole of the personal estate of the intestate, when he has left no kindred nearer than grandfathers, grandmothers, uncles, and aunts, or their descendants, and that it was not designed to defeat the provisions which the statute had before made for nigher relatives.**

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It is our opinion, that under the statute of 1831 regulating descents, &c., the wife of a person dying intestate without issue—leaving a father, mother, brothers or sisters or their descendants—is entitled to only \$100 worth of his personal estate, and one-third of that part of it which may remain for distribution. This the bill shows the complainants have received. It was therefore properly dismissed.

Per Curiam.—The decree is affirmed with costs. To be certified, &c.

J. Pitcher and *W. T. T. Jones*, for the plaintiffs.

E. S. Terry, for the defendants.

BOYLE v. MOSS.

SPECIFIC PERFORMANCE.—The obligee of a title-bond died, and the obligor was appointed his administrator. The Probate Court directed the administrator to sell the land described in the bond for the payment of debts, receive the purchase-money, and make a title to the purchaser. The administrator accordingly sold the land, and gave the purchaser a bond conditioned for a conveyance when the purchase-money should be paid. The administrator received the purchase-money, and removed out of the State. The purchaser, without having demanded a deed, filed a bill in the Probate Court of the county against the administrator and infant heirs of the deceased, for a specific performance. *Held*, that the Court had jurisdiction of the cause, and that the complainant was entitled to a decree.

[*536] *ERROR to the *Switzerland* Probate Court.

SULLIVAN, J.—The bill in this case was filed to compel the specific performance of a contract. *Moss*, the administrator, and *W. Reynolds* and *E. Reynolds*, infant heirs of *P. Reynolds*, deceased, were the defendants in the Court below. The facts of the case as stated in the bill and answer, and the amendments made to them, are as follows: The complainant alleges that *Moss*, in the year 1833, sold to *P. Reynolds*

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the tract of land named in the bill, and gave him a bond for the conveyance of the title, and put him in possession of the land; that shortly thereafter *Reynolds* died without having received a title for the land; that *Moss* took out letters of administration on the estate of *Reynolds*; that the personal estate of *Reynolds* was insufficient to pay his debts, and *Moss* obtained an order from the Probate Court of *Switzerland* county, directing him to sell the land, and when the purchase-money should be paid, to make a title to the purchaser; that he advertised and sold the land, and *Boyle*, the complainant, became the purchaser; that *Moss*, in his character as administrator, gave a bond to the complainant for the conveyance of the title on the payment of the purchase-money: that the complainant has fully paid the purchase-money, and that *Moss*, after receiving it, left the State without making the deed, and removed to distant parts so as to put it out of the power of complainant to demand a deed. The bill prays that the Court decree a title for the land, and such other relief, &c.

The answer of *Moss* admits all the material allegations in the bill, but avers that he has always been, and still is, ready and willing to convey the title, but the complainant has never demanded the same. The defendant, *Moss*, also pleaded two pleas averring his readiness and willingness to perform, and in one of them tendered a deed, in Court, but afterwards, in the progress of the trial, the pleas were withdrawn. The heirs of *Reynolds*, by their guardian, also answered. Various exceptions were taken during the trial to the answer of the defendant, *Moss*, and other proceedings had which it is unnecessary to notice here, because they do not affect the merits of the case. The cause was submitted to the Court below on bill, answer, and exhibits, and at the hearing, the bill was dismissed for want of equity.

This bill we think ought not to have been dismissed.

[*537] It is *admitted on the record, that the land was sold by *Moss* as administrator of *Reynolds*, by virtue of an order of the Probate Court; that *Boyle* became the purchaser; that the sale was approved by the Court; that *Moss*

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gave to the purchaser a bond for the conveyance of the title, received the purchase-money, and gave him a receipt for the same, specifying the object for which the money was paid. The complainant made no demand of the deed, but he has shown in his bill a sufficient excuse for not doing so, and this is not denied by the defendant. The obligor left the State and went to parts remote; and in such case the obligee is not bound to pursue him and demand title. He may, on bill filed for a specific performance of the contract, allege the non-residence of the party as a sufficient excuse for not doing so.

It is contended by the defendant in error, that the Probate Court had not jurisdiction of the case, and that the want of jurisdiction appears on the face of the bill; that the bill shows the defendant, *Moss*, to be the legal owner of the land in his individual right, and the object of the bill is to divest *Moss* of the title and vest it in the complainant.

After a careful examination of the statute, we think the 47th section of the act organizing Probate Courts, conferred upon the Court below jurisdiction of the case. By that section of the act, the Probate Courts are invested with original jurisdiction in all suits at law and in chancery, upon all demands and causes of action against executors or administrators, arising upon any act done, duty omitted, forfeiture incurred, or liability suffered, in the discharge of their trusts, by themselves or those they represent. *Moss*, the administrator, might have assigned to *Boyle* the bond which his intestate held for the title, and this course is authorized by the statute. But because the legal title was in himself, and because the order of the Probate Court authorizing him to sell the land, directed *him* to make the deed to the purchaser, he gave the bond set out in the complainant's bill, instead of assigning the original title-bond; and to this course we see no objection if the purchaser chose to receive it. In consequence of this liability incurred by the administrator, the Probate Court had [*538] jurisdiction of the case, *and having obtained it rightfully, might entertain it so as to do complete justice between the parties.

The State v. Humphries.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

J. Dumont, for the plaintiff.

J. G. Marshall and *J. C. Eggleston*, for the defendant.

THE STATE v. HUMPHRIES.

FORFEITED RECOGNIZANCE—PLEADING.—A *scire facias* against a surety on a recognizance for his principal's appearance at the next term of the Circuit Court is not sufficient, unless it show the default of the principal.(a)

ERROR to the *Rush* Circuit Court.

SULLIVAN, J.—The *scire facias* in this case shows that on the 11th of *March*, 1837, *Erasmus J. Doles*, *Henry Henderson*, and the defendant, *Humphries*, entered into a recognizance before a justice of the peace of *Rush* county, the condition of which was, that if the said *Doles* should personally appear at the next Circuit Court of said county, on the first day thereof, and answer the State of *Indiana* on a complaint of forgery, and abide the judgment of the Court thereon, and not depart without leave, then said recognizance should be void, &c.; that on the first day of the next term, *Humphries*, although three times called and required to bring into Court the body of said *Doles*, came not, but made default; whereupon it was considered that said recognizance be forfeited, and that a *scire facias* issue, &c.

The defendant pleaded to the *scire facias* two pleas: 1st, *Nul tiel record*; and, 2d, that *Doles* did appear before the judges of said Court on, &c., and did not depart thence without leave, &c.

Issue was taken on the first plea, and a demurrer filed to the second. On the demurrer the Circuit Court decided the law to be for the defendant, and judgment was given accordingly.

(a) *Henderson v. The State*, 5 Blackf., 29.

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The plaintiff contends that the second plea is wholly insufficient, and that the Court erred in not sustaining the [*539] demurrer *to it. The defendant admits the insufficiency of the plea, but insists that the *scire facias* is defective, and that the decision of the Court is for that reason correct.

This Court has heretofore said, that a *scire facias* in such a case as this, is an original action to which the defendant may plead, and that the writ must, by proper averments, contain a legal cause of action, and show sufficient matter on its face, to authorize the judgment asked for. *Lang v. The State*, 3 Blackf. 344. It should contain all that is necessary to constitute a good declaration. Here, the undertaking of the defendant was, that if *Doles* did not appear and answer and abide the judgment of the Court, he, the defendant, would pay to the State of *Indiana* the sum named in the recognizance. To fix the liability of the defendant, it should appear on the face of the writ, that *Doles* did not appear and answer the charge, and abide the judgment of the Court, according to the terms of the recognizance. The writ does not inform us whether *Doles* appeared or not, nor does it show that he was called and made default.

The recognizance of the defendant, as appears from the writ, was forfeited, because, on being three times called and required to produce the body of *Doles*, he failed to do so. This, he was not bound by the terms of the recognizance to do. He did not undertake to bring the body of *Doles* into Court. So soon as the principal failed to appear, the defendant became liable to pay the forfeiture, and because the *scire facias* omits to aver that important fact, we affirm the judgment of the Circuit Court.

Per Curiam.—The judgment is affirmed. To be certified, &c.

W. Quarles, for the State.

C. B. Smith, for the defendant.

Blair v. Bass.

BLAIR v. BASS.

DEBTOR AND CREDITOR.—If a debtor execute to his creditor an absolute deed of conveyance for real estate, with a verbal condition that the grantor shall have the right, for a specified time, to redeem by payment of the debt, the deed is but a security for the debt.(a)

[*540] **ASSIGNMENT OF DEBT.**—*The assignment of a debt so secured carries the security with it.(b)

RIGHT OF BONA FIDE PURCHASER.—The debtor in such case may waive the right to redeem, and authorize the creditor to sell the land in order to obtain payment; and in case of a sale, though the debtor's design in authorizing it be to defraud other creditors, a *bona fide* purchaser for value will be protected by a Court of equity.

TRUST.—If A purchase land with B's money, and take the conveyance in his own name, he holds the land in trust for B; and the land so held is liable to the debts of the *cestui que trust*.

SAME—HOW ESTABLISHED.—Such a trust may be established by parol testimony, even against the answer of the trustee. In such case, however, the bill must be supported not only by two witnesses, or by one witness and corroborating circumstances, but the testimony must be clear and should be received with great caution.(c)

SAME.—It can not be shown by parol evidence, in order to establish a trust in real estate, that the person having the legal title purchased the estate with his own money for the use of another; that would be to overturn the statute of frauds.

APPEAL from the *Morgan* Circuit Court.

SULLIVAN, J.—This was a bill in chancery filed against *Whiteley, Blair, and Whittington*, in the *Morgan* Circuit Court. The bill represents that on the 10th of *October*, 1833, *Nesbit & M'Cullough* obtained a judgment against *Whiteley* for the sum of \$228 and costs of suit; that on the 7th of *October*, 1833, *Whiteley*, for the purpose of defrauding *Nesbit & M'Cullough*, and to avoid paying them, conveyed to *Blair* a tract of land containing forty acres lying in *Morgan* county; that on the 29th of *April*, 1834, a *fieri facias* was issued on the judgment of *Nesbit & M'Cullough*, by virtue of which the sheriff levied on

(a) *Hayworth v. Worthington*, 5 Blackf., 361; *Crane v. Buchanan*, 29 Ind., 570, and cases there cited.

(b) *Johnson v. Cornett*, 29 Ind., 59.

(c) *Fausler v. Jones*, 7 Ind., 277; *Miller v. Blackburn*, 14 Ind., 62.

and sold said tract of land, which was purchased by the defendant, *Whittington*, for the sum of forty dollars and fifty cents; that on the 20th of *October* following, an *alias fieri facias* was issued on said judgment, and the same land was again levied on and sold as the property of *Whiteley*, and the complainant became the purchaser. The bill further charges, that the conveyance from *Whiteley* to *Blair* was without consideration; that *Whittington* purchased the land at the first sale, with the knowledge of *Blair*, for *Whiteley's* use, and with *Whiteley's* money, and afterwards, at the request of *Whiteley* and without receiving any consideration therefor, conveyed the land to *Blair*, and that the same is held by him for *Whiteley's* use; that *Whiteley* has remained in possession of the land; and that *Whiteley*, *Whittington*, and *Blair*, had combined to defraud *Nesbit & M'Cullough, &c.*

The bill prays that the conveyances from *Whiteley* [*541] and * *Whittington* to *Blair* may be declared fraudulent and void, and that *Blair* may be directed to convey to the complainant.

The defendants answered separately.

The answer of *Whiteley* states, that on or about the 3d of *January*, 1832, he became indebted to *Woodruff & Scaggins* in the sum of \$300 or thereabouts; that for the purpose of securing them, he made to them an absolute deed in fee-simple for said tract of land, but with the verbal condition that the defendant might redeem the land by paying the debt on or before the 25th of *December* next following, and that if he did not so redeem it, *Woodruff & Scaggins* might sell the land for the best price they could get, and apply the proceeds to the payment of the debt; that on the 31st of *January*, 1833, he had reduced the debt by various payments, to \$186.40, for which amount he then gave his notes; that he failed to pay the residue, and *Woodruff & Scaggins* were about to sell the land for the sum of \$150, when *Blair* proposed to pay the debt, for the land, provided it did not exceed \$200; that *Joab Woodruff*, who had become the assignee of said claim, agreed to let *Blair* have the land if he would pay the debt due from

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the defendant to *Woodruff*, and *Blair* thereupon executed his notes to *Woodruff* for the amount due; that the deed from respondent to *Woodruff & Scaggins* had not been recorded, and it was proposed that said deed should be delivered up to be canceled, and that the defendant should convey directly to *Blair*, all of which was done accordingly; that he had no interest in the contract between *Woodruff* and *Blair*, further than to have his debt to *Woodruff* paid; and that he never did pay any part of the sum assumed to be paid by *Blair* to *Woodruff*. He admits the judgment in favour of *Nesbit & M^c Cullough*, the issuing of the executions, and that he procured *Whittington* to purchase the land at the first sale, and furnished him with twenty-eight dollars, that being all the money he could raise, to enable him to make the payment; that his object was to procure a good title to *Blair* for the land, and save himself from a suit on the covenants in his deed; and that he employed *Whittington* to bid without the knowledge or consent of *Blair*. He admits that he is in possession of the dwelling-house and two or three acres of the land, but says he holds as tenant of *Blair*, paying rent, &c.

Blair in his answer admits, that he knew *Whiteley* [*542] was in debt to *Nesbit & M^c Cullough* at the time he bought the land, and that a suit was pending in their favour against him; that he knew of the conveyance by *Whiteley* to *Woodruff & Scaggins*, and that *Woodruff*, the assignee, was about to sell the land, and he proposed to pay the debt of *Whiteley* to *Woodruff* for the land if it did not exceed \$200; that he accordingly contracted for said land with *Joab Woodruff* at and for the sum of \$176.90, that being the amount then due from *Whiteley*, and gave his note with ten per cent. interest, all of which he has paid except about thirty-five dollars; that the deed from *Whiteley* to *Woodruff & Scaggins* was canceled, and *Whiteley* made respondent a deed for the land. He denies that *Whiteley* furnished any part of the money either directly or indirectly to pay *Woodruff*. He avers that the deed from *Whiteley* to him was made in consideration of defendant's paying *Woodruff* the debt that *Whiteley*

owed him; that he did not take or receive said deed to enable *Whiteley* to defraud *Nesbit & M^c Cullough, &c.* He says that *Whiteley* remains in possession of the dwelling-house and three acres of cleared land, but as a tenant paying rent.

The answer of *Whittington* as to the purchase of the land at the first sale on execution, and the object for which he purchased it, agrees substantially with the answer of *Whiteley*.

To the foregoing answers, the complainant filed a general replication.

Henry Hamilton, a witness for the complainant, testified that *Whittington* bought the land at the sale on the first execution, and said that he bought it for *Whiteley*; that he heard *Whiteley*, before the sale, say that he had sold the land to *Blair*, and wished to buy it at the sale to make *Blair* secure. The witness never heard *Blair* say any thing about it. He has heard *Whiteley* say, that the debt to *Nesbit & M^c Cullough* was unjust, and he would sacrifice every cent he had before he would pay it. On the morning of the sale the witness lent some money to *Whiteley*, and thinks he saw the same money in the hands of *Whittington* shortly before the sale.

Charles Ross, testified, that in the year 1834, a quantity of corn which *Whiteley* owned, was sold on execution, and the witness bought it for *Whiteley*, and with his money. He supposes it was the same execution on which the land was first sold.

[*543] **James Murphy* attested the deed from *Whiteley* to *Blair*, and the notes from *Blair* to *Woodruff*, amounting to about \$175. The deed and the notes were executed at the same time.

Isaac Holeman testified, that in the spring of 1833, he offered to *Woodruff* \$250 for the land in controversy, which the latter refused to take, but said if *Whiteley* did not soon pay him, he would sell the land.

David Miller testified, that about a week after the judgment in favor of *Nesbit & M^c Cullough* was rendered against *Whiteley*, he heard *Blair* say that he was afraid he had brought himself into trouble; that if he had not thought that *Whiteley*

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would have gained the suit, he would not have bought the land; that it was in the hands of *Woodruff*, and that *Whiteley* would lose it unless somebody would buy it. He further said that he had bought the land of *Woodruff* before *Whiteley* knew anything about it. The witness charged *Blair* with paying for the land with *Whiteley's* money, but *Blair* denied it.

William H. Craig testified, that he was sheriff of *Morgan* county at the time of the sale to *Whittington*, that a part of the purchase-money was paid by *Blair*, and that *Blair* paid *Whittington* one dollar and fifty cents for his services.

Joab Woodruff, the assignee of *Woodruff & Scaggins*, testified to the contract between *Blair* and himself for the land as stated in the defendants' answers. He has heard *Whiteley* say that he would not pay *Nesbit & McCullough* if he could help it, because the demand was unjust, but never heard *Blair* say anything about it. He says that *Blair* bought the land and gave his notes for the purchase-money, all of which he has paid except about thirty-five dollars.

Other depositions were read by the complainant, to prove that *Whiteley* was indebted to other persons at the time of the conveyance to *Blair*; and that after the conveyance, *Whiteley* remained in possession of the land.

On the part of the defendant, *James McIntyre* and others testified to the sale of the land by *Whiteley* to *Woodruff & Scaggins*, and to the sale from *Joab Woodruff* to *Blair*. They also proved the contract between *Blair* and *Whiteley*, for the rent of that part of the premises occupied by *Whiteley*; that *Whiteley* occupied it as the tenant of *Blair*, and paid rent for it; that *Blair* lived about one mile and a half from [*544] the *land, and cultivated that part of it not occupied by *Whiteley*.

The Circuit Court, on the final hearing of the cause, decreed that the deed from *Whiteley* to *Blair* was fraudulent, as made to defeat the creditors of *Whiteley*, and held the same to be null and void, &c. From that decree *Blair* has appealed to this Court.

If the money paid by *Blair* to *Woodruff* was the money of

Whiteley, there would be but little room for doubt about this case. It is not denied but that the purchase made by *Whittington* was at the request of *Whiteley*, and the greater part of the purchase-money was furnished by him. Of this part of the transaction, *Blair* was informed before he received a conveyance from *Whittington*.

The conveyance from *Whiteley* to *Woodruff & Scaggins* was a fair and *bona fide* transaction. This all the parties admit. The deed, however, though absolute in terms, was but a security, and the assignment of the debt from *Woodruff & Scaggins* to *Joab Woodruff* carried the security with it. *Whiteley* might have redeemed the land at any time, even in the hands of the assignee, by paying the debt which it was given to secure. He might, also, we suppose, waive that right, and authorize the mortgagee to sell the land either at public or private sale, and raise the money due him. In that case, even if his object was to hinder or delay *Nesbit & M^c Cullough*, the purchaser, if he bought without fraud, would be entitled to the protection of a court of equity; for however fraudulent the intention of *Whiteley* might be, a *bona fide* purchaser for a valuable consideration is protected. *Roberts v. Anderson*, 3 J. C. R., 371; *Hendricks v. Robinson*, 2 Id., 283.

In this case, the complainant contends that the conveyance from *Whiteley* to *Blair*, and the purchase by *Whittington* at the first sale, and his conveyance to *Blair*, were all fraudulent, as being made for the purpose of defrauding *Whiteley's* creditors, *Nesbit & M^c Cullough*.

It should be remembered that *Woodruff* was also a creditor, and that the transactions of the 7th of *October*, 1833, were had with special reference to the payment of the debt due to him, and being authorized to sell the land, if *Blair* bought it from him in good faith, and paid his own money for it, the fact of his receiving a conveyance from *Whiteley* can not, [*545] we think, *affect his right, because it was a part of the contract with *Woodruff* while the title remained in him, that the conveyance should be so made.

The allegations in the bill that *Blair* paid the debt to

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Woodruff with *Whiteley's* money, and that he took the conveyance of the land for *Whiteley's* use and benefit, are positively denied in the answers of *Whiteley* and *Blair*. It is true, that a trust may be established by parol testimony against the answer of a defendant. In such case the bill must be supported not only by two witnesses, or by one witness and corroborating circumstances, but the testimony must be clear, and even then should be received with great caution. 1 Johns. C. R., 582. To raise the trust, it must be proved that *Blair* paid *Whiteley's* money, or a part of it, for the land. The complainant will not be permitted to show for that purpose, by parol testimony, that *Blair* bought the land with his own money for *Whiteley's* use, "because that would be to overturn the statute of frauds."

This case, then, must rest upon the answer to the simple question, whose money paid the debt to *Woodruff*? If the purchase was made from *Woodruff* with *Whiteley's* money, or if *Whiteley* paid the notes of *Blair* to *Woodruff*, the deed to *Blair* was voluntary; he is the trustee of *Whiteley*, and the land is liable, in his hands, to the debts of the *cestui que trust*.

On a careful examination of the testimony, we think it is not sufficient to sustain the bill. The money paid to *Woodruff* was paid by *Blair*, and there is no proof that any part of it was furnished by *Whiteley*. All the suspicion that is thrown about the case, arises from the anxiety manifested by *Whiteley* that *Blair* should get the land, and from his declarations that the claim of *Nesbit & M'Cullough* was unjust, and that he would not pay it if he could help it. But we have no evidence that *Blair* was privy to the designs of *Whiteley*; and if we had, having paid *Whiteley's* debt to *Woodruff*, he stands in the light of a creditor, and is, in that point of view, entitled to the protection of a court of equity. *Hendricks v. Robinson*, above cited. Indeed, the testimony as we view it, goes rather to establish the fact that *Blair* purchased the land for his own use, and paid for it with his own money. The poverty of *Whiteley*, the frequent declarations of *Blair* which are made testimony in the case by the complainant, together with the

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proof of payments made by *Blair* to *Woodruff*, concur to satisfy us of that fact.

[*546] *There is no proof that *Whiteley*, after the conveyance to *Blair*, remained in possession of the land enjoying the rents and profits, as alleged in the complainant's bill. On the contrary, the testimony is that he rented a small parcel of the ground from *Blair* at a certain yearly rent, and has occupied that part of it as the tenant of *Blair*.

The purchase by *Whittington* and his conveyance to *Blair* can not affect this case. If *Blair* was a *bona fide* purchaser of the land, as we think he was, before the sale to *Whittington*, his title can not be affected by that sale, and the conveyance from *Whittington* can neither weaken nor strengthen his title.

Per Curiam—The decree is reversed with costs. Cause remanded with directions to the Circuit Court to dismiss the bill, &c.

H. Brown and *J. Eccles*, for the appellant.

P. Sweetser, for the appellee.

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SELF DEFENSE.—*Son assault* is a good defense to an indictment for *mayhem*, but the defense can only be sustained by proof that the resistance was in proportion to the injury offered.

ERROR to the *Union* Circuit Court.

SULLIVAN, J.—This was an indictment for simple *mayhem*, under the 31st section of the act of 1831, relative to crime and punishment. The indictment charges the defendant with unlawfully, &c., slitting and biting the ear of *A. Patterson* (the prosecuting witness), to his damage, &c.

After the testimony was closed, the defendant moved the Court to instruct the jury: 1. That to sustain the prosecution the State must prove that the defendant assaulted *Patterson*, otherwise they must find him not guilty. 2. That if they

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should find, from the evidence, that *Patterson* assaulted and attacked the defendant, in consequence of which a fight ensued in which the defendant bit off a part of the [*547] ear of *Patterson*, *the defendant is not guilty as charged. 3. That if *Patterson* assaulted and attacked the defendant, in consequence of which they engaged in a fight, each trying to conquer the other, and the defendant during the fight bit off a piece of *Patterson's* ear, the defendant is not guilty of a *mayhem*. 4. That if the defendant and *Patterson* agreed to fight together, and did actually fight in pursuance of that agreement, and during the fight the defendant bit off a piece of *Patterson's* ear, he is not guilty of a *mayhem*. 5. That if the jury believe that the father of the defendant was attacked, on his own premises, by *J. Patterson*, and the said *A. Patterson*, and the defendant struck the said *A. Patterson* in defense of his father, and if in consequence of such striking a fight ensued, during which the defendant bit off a piece of the ear of said *A. Patterson*, he is not guilty of a *mayhem*.

The first instruction asked was given by the Court with this addition, that every *mayhem* includes an assault. The remaining instructions asked for, the Court refused, but instructed the jury that it made no difference who commenced the attack, or who made the first assault; that the defendant was guilty of a *mayhem* as charged, if he willfully bit off a piece of the ear of said *A. Patterson*, unless he did it in necessary self-defense, or to protect himself from grievous bodily injury, &c.

The instructions we think were right. A previous assault upon a defendant, in a prosecution of this kind, is evidence in justification under the plea of not guilty. But in order to make it a good justification, it ought to appear that the striking by the defendant was in his own defense, and in proportion to the attack made on him. The law is well settled, that a person thus assaulted may use as much force as is necessary for his defense, but he may not kill, wound or maim his antagonist, unless it be necessary to save his life, or protect himself from great bodily harm. Every assault will not justify every battery. *Self assault* is a good plea in *mayhem*, but it must appear

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that the degree of resistance was in proportion to the nature of the injury offered. 1 Bay's R., 351; *Cockcroft v. Smith*, 2 Salk., 642; 1 Ld. Raym., 177; Buller's N. P., 18; 2 Stark. Ev., 70.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

C. H. Test, for the plaintiff.

W. Quarles, for the State.

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GOUDY v. THE STATE.

JUSTICE'S TRANSCRIPT—EVIDENCE.—On the trial of an indictment for an assault and battery, the defendant, in order to prove a former conviction before a justice for the same offense, may introduce a transcript of the justice's record showing the defendant's conviction of the offense, though the transcript do not state that some person, present at the commission of the offense, was examined as a witness, &c. But whether the transcript is sufficient, *prima facie*, to sustain the defense, *quære*.

SAME.—The facts relative to the evidence given at the trial before the justice, may, in such case, be proved by parol.

ERROR to the *Fayette* Circuit Court.

BLACKFORD, J.—Indictment for an assault and battery. Plea, not guilty. Judgment for the State.

The defendant, on the trial, offered in evidence a transcript from the record of a justice of the peace, showing a former conviction of the defendant for an assault and battery, alleged to be the same offense. The transcript was objected to as evidence, because it did not state that some person, present at the commission of the offense, was examined as a witness, or, &c., conformably to the statute. The Court sustained the objection; although the defendant offered, at the same time, to prove by oral testimony, that a person who saw the assault and battery was examined on the trial before the justice.

We think the transcript ought to have been admitted. The testimony given on the trial of a cause is not, in ordinary

cases, any part of the record; and we find nothing in the statute in question, requiring any of the evidence to be entered on the justice's docket in this particular case. Rev. Code, 1831, p. 295. The transcript was admissible; but whether it was, of itself, *prima facie* sufficient, and made it necessary for the State to prove that the requisite testimony was not given at the trial, is a question not raised in the cause. Supposing that it was incumbent on the defendant in the indictment to prove, *in the first instance*, not only the conviction, but also that the proper evidence was before the justice, still the judgment excluding the transcript is erroneous, since the facts relative to the evidence given at the trial might be proved by parol.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

C. B. Smith, for the plaintiff.

W. Quarles, for the State.

[*549] *OEDLL and Another v. GARNETT.

PROFANE SWEARING.—Trespass against a justice and constable for an assault and battery, &c. The justice pleaded that he had entered three fines against the plaintiff for “profanely swearing three several oaths by taking the name of God in vain,” and that the imprisonment, &c. The constable pleaded, that as constable under a mittimus in said case, &c., he did, &c. *Held*, that the description of the offenses in the pleas was sufficient.

APPEAL from the *Hendricks* Circuit Court.

BLACKFORD, J.—An action of trespass for an assault and battery and false imprisonment, was brought by *Garnett* against *M’Millan* and *Odell*. The defendants pleaded the general issue; and they, also, each pleaded specially. *Odell* filed two special pleas, which are substantially the same. He states in those pleas, that he was a justice of the peace, and that as such justice he had entered three fines against the plaintiff for profane swearing; and that the imprisonment was

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occasioned by the plaintiff's refusal to pay or replevy the fines. *M. Millan* justifies as a constable, under a mittimus issued by Justice *Odell* in the case of the fines mentioned in *Odell's* pleas. A general demurrer was sustained to the special pleas. The cause was then tried under the general issue, and the plaintiff obtained a judgment.

The justice states in his special pleas, that the fines against the plaintiff were for "profanely swearing three several oaths by taking the name of God in vain." The mittimus relied on by the constable, shows that it was issued in consequence of the fines for those offenses.

There is no objection made to the special pleas in this case, except that they do not so describe the offenses as to show them to be finable under the statute. We think this objection to the pleas is not sustainable, and that the demurrers should have been overruled. The statute prohibits profane swearing by or in the name of God, and the offenses in question are of that description. Rev. Code, 1831, p. 194.

Per Curiam.—The judgment is reversed and the verdict set aside, with costs. Cause remanded, &c.

W. Quarles, C. Fletcher and O. Butler, for the appellants.

H. Brown, for the appellee.

[*550] *HARRIS and Another v. SMITH, for the use of Cox.

PLEADING.—The general issue, or a plea of failure of consideration, to an action of debt on a sealed note by the payee, does not put in issue the plaintiff's property in the note.

POSSESSION EVIDENCE OF TITLE.—The payee's possession of a note, notwithstanding an indorsement on it in full, is *prima facie* evidence that the note is his.(a)

APPEAL from the *Hendricks* Circuit Court.

BLACKFORD, J.—This was an action of debt commenced

(a) *Williams v. Dyer*, 5 Blackf., 160.

before a justice of the peace. The names of the parties on the justice's docket, are *Joshua Smith*, for the use of *J. W. Cox*, against *John Harris* and *Thornton F. Gorham*. A sealed note for the payment of money, executed by the defendants and payable to *Joshua Smith*, was filed as the cause of action. There was only one plea, and that was a failure of part of the consideration for which the note was given. The justice gave judgment for the plaintiff. The defendants appealed to the Circuit Court, and the plaintiff there also obtained a judgment.

On the trial in the Circuit Court, the plaintiff introduced the note in evidence, and then rested his cause. The defendants offered to read in evidence the following assignment indorsed on the note: "I assign the within to *J. W. Cox*, August 4, 1835. *Joshua Smith*." This assignment was objected to as evidence, because its execution was not proved; and the objection was sustained. The rejecting of this evidence is the only error assigned.

The plaintiff's property in the note was not put in issue by the plea; nor would it have been in issue, had *non est factum* been pleaded. To authorize the introduction of evidence *dehors* the note, in order to prove the plaintiff's want of property in it, a plea in denial of such property was necessary. *Gully v. Remy*, July term, 1820. But the defendants contend that the plaintiff himself, by producing the note with the assignment on it, has shown that the note does not belong to him, and that the action on it in his name can not be supported.

We are of opinion, however, that the assignment does not, of itself, show, under the circumstances of the case, that the property of the note was not in the plaintiff. He was the payee of the note, and his possession of it, notwithstanding the *indorsement, was *prima facie* evidence that the note was his. This is decided by the case of *Hanna v. Pegg* in this court, May term, 1822, and by the case of *Dugan v. The United States*, 3 Wheat. Rep., 172.

As the defendants, could not, under the pleadings, introduce any *extrinsic* evidence of the plaintiff's want of property in

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the note, and as the indorsement was not of itself, under the circumstances of the case, any evidence of such want of property, it follows that the assignment was properly rejected. The reading of it could have been of no possible benefit to the defendants.

The question whether the assignment, had it been material evidence for the defendants, could have been read by them without proof of its execution, does not belong to the case.

Per Curiam.—The judgment is affirmed with five *per cent.* damages and costs.

C. C. Nave, for the appellants.

C. Fletcher and *O. Butler*, for the appellee.

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*HILER v. THE STATE.

CRIMINAL LAW—REASONABLE DOUBT.—The prisoner should be acquitted, in all criminal cases, unless the testimony satisfy the jury, beyond a reasonable doubt, that he is guilty.^(a)

ERROR to the *Parke* Circuit Court.

SULLIVAN, J.—The defendant was indicted for an assault and battery with intent to murder. The jury found him guilty of an assault and battery. Judgment on the verdict.

On the trial of the cause, the defendant's counsel moved the Court to instruct the jury, "that if after hearing all the evidence in the cause, there remained in their minds a rational doubt of the guilt of the defendant, they ought to find him not guilty." The Court refused to give the charge as asked, but they instructed the jury, "that they must be satisfied beyond a rational doubt of the guilt of the defendant, before they could find him guilty of the assault and battery with the intent to commit murder; but if the offense fell short of that, (although the consequence of a conviction might be imprison-

(a) *Hepp v. The State*, 5 Blackf., 149; *Walker v. The State*, 6 Id., 1.

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ment), the doctrine of rational doubt did not apply, and that the jury ought to find according to the weight of evidence," &c. To this instruction the defendant excepted.

The distinction made by the Circuit Court in the foregoing instruction, is not sustained by the authorities. The principle is well settled, "that *in all criminal cases whatsoever*, it is essential to a verdict of condemnation that the guilt of the accused should be fully proved; that neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt." 1 Stark. Ev., 5 Am. ed., 478. There is a ground of distinction in this respect between civil and criminal cases; but it does not exist between felonies and misdemeanors. In civil cases, the jury weigh the testimony, and after striking a fair balance, decide accordingly; but in criminal cases, the testimony must be such as to satisfy the jury beyond a rational doubt, that the prisoner is guilty of the charge alleged against him in the indictment, or it will be their duty to acquit. M'Nally's Ev. 2—4, 578. The Court erred in not giving the instruction asked for, and the judgment must be reversed.

[*553] **Per Curiam*.—The judgment is reversed and the verdict set aside. Cause remanded, &c.

T. A. Howard and W. P. Bryant, for the plaintiff.

W. Quarles, for the State.

LOVE v. KIDWELL and Others.

PLEADING.—When a deed, whether a single bill or a bond with a condition is the foundation of an action of debt, *nil debet* is a bad plea on general demurrer.(a)

SAME—ATTACHMENT-BOND.—It was stated in the condition of an attachment-bond, that the attachment had issued; and the condition was set out in a

(a) *Smith v. Stewart*, 6 Blackf., 162; *Eakle v. Oliver*, 5 Id., 3; 1 Ind., 484.

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declaration on the bond. *Held*, on general demurrer, that a plea denying that the attachment had issued was inadmissible.

SAME.—Whether the pendency of an attachment-suit can be pleaded to an action on the attachment-bond?—*quære*.

SAME.—The declaration in a suit on an attachment-bond stated the condition of the bond to be, that the plaintiff should duly prosecute the writ, and pay all damages which the defendant might sustain should the proceedings be oppressive. The breach assigned was, that though the writ issued, and the proceedings were wrongful and oppressive, the defendant had not paid the penalty of the bond. *Held*, on general demurrer, that the breach was insufficient. (a)

APPEAL from the *Union Circuit Court*.

DEWEY, J.—This was an action of debt upon a penal bond. The declaration sets out the condition of the bond, which, after reciting that *Kidwell*, one of the defendants, had issued a writ of foreign attachment against the plaintiff, stipulates, that if *Kidwell* should “duly prosecute his said writ of foreign attachment against the said *Love* to final judgment, and pay all damages that might be sustained by him, provided the proceedings should be wrongful and oppressive, then the bond to be void,” &c. The breach assigned is, “Yet the said defendants, although the said *Kidwell* did then and there sue out such writ of foreign attachment against the said plaintiff, as aforesaid, and although his, the said *Kidwell*’s, proceedings in the said attachment were groundless, illegal, wrongful and oppressive, by means whereof the said writing obligatory became and is forfeited, and an action hath accrued to the said plaintiff to demand and have of and from the said defendants the sum of, &c. (the debt), above demanded, have not [*554] nor *has either of them, although often requested so to do, paid the said debt,” &c.

Pleas: 1. *Nil debet*. 2. The bond was given without any consideration. 3. No writ of attachment was ever issued. 4. At the time of the commencement of this suit, the proceedings in attachment were undetermined and pending in the Circuit Court.

Issue upon the second plea, and general demurrer and joinder

(a) *Michael v. Thomas*, 27 Ind., 501.

to the others. The Court overruled the demurrer, and gave judgment for the defendants.

Nil debet is not a good defense to an action founded on a specialty. The seal implies a consideration, and is *prima facie* evidence of a debt; and as this plea does not put in issue the execution of such an instrument, it is bad on general demurrer. There is no distinction, as to the validity of this plea, between a single bill and a bond with condition, whatever may be the character of the condition. When the deed is the foundation of the action, although extrinsic facts may be mixed with it, *nil debet* is not a sufficient plea. 1 Chitt. Pl., Day's ed., 478; *Atty v. Parish*, 1 N. R., 104; 2 Saund., 187, n. 2. When the specialty is but inducement, and matter of fact is the foundation of the action, *nil debet* is a good plea. It is upon this principle that this plea is allowable to debt for rent reserved by indenture of demise; the lease is the inducement, and arrears of rent the gist of the action. 1 Saund., 38, n. 3; 1 Chitt. Pl., 477. It is, however, observable that the usual mode of declaring practiced in these cases, of setting out a demise without stating it to be under seal (when in fact it is so), is an exception to a general rule of pleading. 1 N. R., 104.(1)

The plea, that no writ of attachment was ever sued out, is bad, because it denies a fact which is admitted to have existed by the condition of the bond, which is set out in the declaration. The plaintiff had a right to avail himself of the estoppel by demurrer; it is not necessary to reply that matter when it appears by the previous pleading. 1 Chitt. Pl., 575; 1 Saund., 325, n. 4.

The defense set up by the last plea, that the attachment-suit was pending and undetermined at the commencement of this action, is of a more doubtful character; and as [*555] the result *must be the same whether that plea be good or bad, we give no opinion upon it.

The declaration is substantially defective; and the demurrer reaches the defect.

The condition of the bond is, that the plaintiff in attach-

ment should duly prosecute his writ, and pay all damages which the defendant might sustain, should the proceedings thereon be oppressive. The breach assigned is, that though the writ issued, and the proceedings were wrongful and oppressive, the defendants had not paid the penalty of the bond. This breach evidently does not conform to the nature of the stipulation in the condition; it does not negative the performance of the contract.

The declaration should have shown, that the oppressive proceedings in attachment had injured the plaintiff in this suit, the nature of the damages he had sustained, and that the defendants had not paid them. It is true, the 25th section of the attachment act provides, that if on the trial of the suit on the bond, it shall appear to the satisfaction of the jury, that the proceedings had on the attachment were wrongful and oppressive, the person aggrieved shall recover damages at the discretion of the jury.

But this provision was not designed to change any of the rules of pleading, nor to dispense with the application of known legal principles in the assignment of the breach of that condition of the bond, which another part of the same statute had prescribed. Its object was to clothe the jury with power, adequate to the redress of all injuries inflicted by means of this *ex parte* proceeding, and calculated to check improper resort to a statutory privilege peculiarly liable to abuse.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

J. Ryman, for the appellant.

J. S. Newman, for the appellees.

(1) *Vide Trimble et al. v. The State, ex rel. &c. ante, p. 435, and note.*

Catlett v. McDowell, in Error.

[*556] *CATLETT v. M'DOWELL, in Error.

ASSUMPSIT on the promissory note dated the fourth of *January*, 1836, and payable one year after date. Pleas: 1. The general issue. 2. That the note was given for a part of the consideration of a tract of land, which the plaintiff was to convey to the defendant, free from incumbrances, on the day and year aforesaid, but which he had not so conveyed. 3. Similar to the second. 4. Similar to the second, except that it states that the land was to be conveyed in fee-simple, by a good and sufficient deed of conveyance with the usual covenant of general warranty, and that it had not been so conveyed. Replication to the second plea, admitting the consideration of the note as alleged, and stating that on the ninth of *March*, 1836, the plaintiff had fully complied with his agreement, by executing and delivering to the defendant a good and sufficient warranty deed for the land. *Held*, on general demurrer, that the third and fourth pleas and the replication to the second plea, were sufficient.(1)

The defendant may, under the general issue, defeat an action of assumpsit on a promissory note, by showing the want or failure of consideration, or he may reduce the damages by showing a partial failure of the consideration. *Jamison v. Buckner*, 2 Blackf., 77; *Street v. Blay*, 2 Barn. & Adol., 456.(2)

(1)There was another point decided in this cause relative to the replication to a fifth plea, but the decision as to that point having been since overruled, is omitted.

(2)Accord. *Tucker v. Tipton*, ante, p. 529.

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terest in the property, and leaving by her marriage with *B* one son, *C*, her only heir. Previously to his wife's death, *B* obtained from the Agent of State a conveyance in fee for said half lot, and sold it after her death to a purchaser without notice. *B* died. *Held*, that the purchaser from *B* had no title to the premises, and that *C*, as the heir of his mother, was entitled to a conveyance for the same from the Agent of State.—*Chill v. Hornish et al.*.....454

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2. The Circuit Court overruled the appellee's motion to dismiss an appeal. The motion was founded on the affidavit of a third person of his belief that the appeal-bond was not executed within the time required by the statute. The record and bond showed on their face that the bond was executed and filed in time. *Held*, that the motion was correctly overruled.—*Malaby v. Hinkston*..127
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10. An appeal-bond is not objectionable merely because the condition is, *inter alia*, for the payment of all costs that have or shall accrue, &c., instead of *and* shall accrue, &c.—*McCall v. Trevor et al.*.....496
11. An appeal will not be dismissed for the insufficiency of the appeal-bond, if a good bond be filed on the calling of the cause.....*Ibid.*
12. A defendant having appealed from the judgment of a justice, filed in the Circuit Court two special pleas in bar, upon which issues were joined. Verdict and judgment for the defendant. The judgment was reversed by the Supreme Court, and the cause remanded for another trial. Afterwards, the plaintiff moved the Circuit Court to reject the pleas, because they were not filed until after the appeal, but the motion was overruled. He also moved to dismiss the appeal, on the ground that the justice had not filed the papers in time. This motion was also overruled. *Held*, that the motions were made too late, and were therefore correctly overruled. *Abel v. Burgett.*.....511
2. The want of notice of the time and place of the meeting of the arbitrators is no objection to an award, provided the party appeared and was heard before the arbitrators.....*Ibid.*
3. The arbitrators to whom a cause pending in the Circuit Court is referred need not be sworn.....*Ibid.*
4. In the case of such a reference, the award must be filed, approved of by the Court, and recorded, and a *scire facias* be issued, &c., before the rendition of judgment on the award.....*Ibid.*
5. At common law, any persons, though no suit was pending, might submit their matters of difference to arbitrators; and their agreement for the purpose might be without writing, or by writing either with or without seal.—*Titus v. Scantling et ux.*.....89
6. The arbitration-bonds, at common law, contained no agreement that the submission should be made a rule of Court.....*Ibid.*
7. The *English* statute of William III, and the statutes of *Ohio* and *Indiana*, relative to arbitration, authorize the insertion of such an agreement into arbitration-bonds, and thus provide for a remedy by attachment against the defaulting party; but at the same time, these statutes do not impair the validity of arbitration-bonds which do not contain the agreement; and an action of debt still lies on such bonds at common law.....*Ibid.*
8. Trespass *vi et armis*. Plea, not guilty. At the *October* term, 1833, the cause by a rule of Court was referred to arbitration. At the *October* term, 1834, the arbitrators returned their award, by which they merely say that they find for the defendant. The plaintiff being then called and not answering, the suit was dismissed at his costs. The plaintiff sued out a writ of error, and the judgment was affirmed with costs. *McCracken v. Gregory.*.....128
9. Awards before justices of the peace may be set aside by the Circuit Court for mistakes of the arbitrators in matters of law; and such mistakes may be proved, under the statute, by extrinsic evidence.—*Claypool v. Miller.*.....163
10. To an action on an award, the defendant pleaded that there was no such award as alleged. *Held*, that,

APPEAL-BOND.

See APPEAL, 7, 10, 11. EXECUTORS AND ADMINISTRATORS, 2, 3.

APPEARANCE.

See ARBITRATION, 2. DOCKET-FEE, 1.

APPRENTICES.

See INFANT, 3, 4. OVERSEERS OF THE POOR.

ARBITRATION.

See WITNESS, 2, 3.

1. An award in the plaintiff's favour cures the same defects in the declaration, which would be cured by a verdict —*Dickerson v. Hays.*.....44

by the statute, the plea, should be sworn to.—*Dickerson v. Tyner*...253

11. If when a suit is pending, the parties, by their bond, submit the cause to arbitration, the successful party is not confined to the statutory remedy of having the award made the judgment of the Court; but he may sue on the award...*Ibid.*
12. An award that one of the parties shall pay to the other a certain sum of money, can not be objected to as not being final.....*Ibid.*
13. Arbitrators may, by virtue of the statute, award the costs of the reference, though the agreement to submit be silent on the subject.....*Ibid.*
14. An executor or administrator may maintain an action on an award, though the matters submitted arose out of tort.....*Ibid.*
15. If the subject of difference in a suit pending in the Circuit Court be referred to arbitration, the award, if no time for making it be fixed, should be returned to the next term of the Court; and if it be not so returned, the plaintiff may have the cause tried as if no reference had been made.—*Minton v. Moore*...315

ARBITRATION-BOND.

See ARBITRATION, 6, 7.

ARREST OF JUDGMENT.

An indictment charged that the defendant did feloniously *steal*, take and carry away, one watch of the value of five dollars, &c. Plea, not guilty. Verdict, "We find the defendant guilty of petit larceny, and that he be imprisoned," &c. Motion in arrest of judgment overruled, and judgment on the verdict. *Held*, that the use of the word *steal* instead of *steal*, was not a sufficient cause to arrest the judgment; but that the verdict did not authorize the judgment, as the defendant might have been guilty of petit larceny without being guilty of the larceny charged in the indictment.—*Wills v. The State*.....457

ASSAULT AND BATTERY.

A charge of an assault and battery with intent to kill, is only a charge of an assault and battery; the words "with intent to kill" being surplusage.—*Sweetser et al. v. The State*..528

ASSESSMENT-ROLL.

See EVIDENCE, 14.

ASSIGNMENT.

See BOND, SINGLE, 1. JUSTICE OF THE PEACE, 18. LAND OFFICE CERTIFICATE, 1, 2, 3. LIEN, 2. MORTGAGE, 7, 13. PATENT RIGHT, 2. PLEADING, 18. PROMISSORY NOTES, 1, 8, 15, 16. SALE OF GOODS, 4.

No particular form is necessary to constitute an assignment, in equity, of a chose in action; and the assignment in such case may even be by parol.—*Slaughter v. Foust et al*...379

ASSIGNMENT OF BREACHES.

See ATTACHMENT, 3. BASTARDY, 4. JUSTICE OF THE PEACE, 5, 6, 8. PRACTICE, 1. SHERIFF'S BOND, 1.

ASSUMPSIT.

See CONTRACT, 1. INTEREST, 1. LAND OFFICE CERTIFICATE, 2. MONEY HAD AND RECEIVED. PLEADING 1, 4, 7. VENDOR AND PURCHASER, 5.

1. If a party having covenanted to perform certain work, has performed it, but not agreeably to the covenant, the person for whom it was done may, either expressly or impliedly, render himself liable in assumpsit for the work done.—*Canby v. Ingersol*.....493
2. The special agreement in such case is admissible evidence for the plaintiff to prove the value of the services rendered..... *Ibid.*

ATTACHMENT.

See ARBITRATION, 7. CHANCERY 3. TRESPASS, 20.

1. It was stated in the condition of an attachment-bond, that the attachment had issued, and the condition was set out in a declaration on the bond. *Held*, on general demurrer, that a plea denying that the attachment had issued, was inadmissible.—*Love v. Kidwell et al.*553
2. Whether the pendency of an attachment-suit can be pleaded to an action on the attachment-bond?—*quære*..... *Ibid.*
3. The declaration in a suit or an attachment-bond stated the condition of the bond to be, that the plaintiff should duly prosecute the writ, and pay all damages which the defendant might sustain should the proceedings be oppressive. The breach assigned was, that though the writ issued, and the proceedings were

wrongful and oppressive, the defendant had not paid the penalty of the bond. *Held*, on general demurrer, that the breach was insufficient.....*Ibid*.

ATTACHMENT-BOND.

See ATTACHMENT.

ATTESTING WITNESS.

See EVIDENCE, 30.

ATTORNEY.

See DEPOSITIONS, 2.

AWARD.

See ARBITRATION, 1, 2, 4, 8 to 15.

B

BAIL.

It is no defense to a suit against special bail, when sued on their recognizance, that the proceedings against their principal are erroneous.—*Cutshaw v. Birge et al.*.....511

BAILMENT.

See DEPOSITS IN BANK, 3.

BANK NOTES.

See DEPOSITS IN BANK. TROVER, 7.

1. Where bank notes have been obtained from the owner by means of a forgery, and have been received by a third person *bona fide*, for value and without notice, the claim of such third person, if he was guilty of gross negligence in taking the notes, must yield to that of the original owner.—*Coffin v. Anderson*...395

2. A obtained certain bank notes from a bank by means of a forgery, and afterwards exchanged them with another bank and with individuals for other bank notes. *Held*, that the bank imposed on by the forgery was entitled to the last mentioned bank notes, which were in A's possession and had been received by him as aforesaid, as its property.

Ibid.

BARON AND FEME.

See HUSBAND AND WIFE.

BASTARDY.

1. When a justice of the peace binds a person in a recognizance to the Circuit Court to answer an accusa-

tion of bastardy, the original recognizance should be filed by the justice in the Circuit Court.—*The State v. Lewis*.....20

2. It is no objection to such a recognizance, that is entered into by a third person and not by the party himself.....*Ibid*

3. The condition of a penal bond executed by A and another, recited that A had been adjudged by the court to be the father of a bastard child, of which H was the mother, and had been ordered by the court to pay a certain sum to the mother, and certain other sums to the clerk of the court for the use of the person who should afterwards support the child, and then stated that if the several sums should be so paid the bond should be void, otherwise in force. *Held*, that the bond thus taken to secure a compliance with the order of the court, is authorized by the statute.—*Trimble et al. v. The State*.....42

4. If a declaration in such case, setting out the condition and assigning breaches, be demurred to and the demurrer be sustained, the judgment on demurrer should be interlocutory only; and the truth of the breaches and the amount of the damages should be determined by a jury. After that, final judgment may be rendered for the penalty with costs, and execution be awarded for the damages assessed with costs.....*Ibid*.

5. If the judgment of a justice, in a case of bastardy, be rendered against the defendant in his absence, and be not complied with, the justice must certify the case to the Circuit Court for a final determination. And if, in such case, the defendant reside in another county, the process for his appearance in the Circuit Court to answer the charge may be directed to the county in which he resides.—*Allen v. The State*.122

6. The Circuit Court, in such a case, may render a judgment for such sum or sums of money as it thinks proper for the maintenance of the child, and also a judgment for costs; but the damages for the seduction of the mother, or the expenses of her lying-in, are not recoverable in this prosecution.....*Ibid*.

7. In prosecutions for bastardy, under the statute providing for the support

of illegitimate children, it must appear that the mother of the child was unmarried and a resident of the State.—*Smith v. The State*.....188

8. A justice's transcript in a case of bastardy stated, that the justice had adjudged the defendant to be the father of the child, and had recognized him to appear in the Circuit Court; but it omitted to state that the defendant had failed to compensate the mother. *Held*, that the Circuit Court ought not, for that omission in the transcript, to discharge the defendant from his recognizance. *Held*, also, that if the compensation had been made, bond given, &c., the same might be pleaded in the Circuit Court in bar of the accusation.—*The State v. Allen*.....269
9. The mother's affidavit in such case need not state that she is resident in the county, or that the child was born there, or that it is alive...*Ibid*.
10. After the defendant's discharge from his recognizance in such case, it is too late for a motion on the part of the State to have the recognizance forfeited.....*Ibid*.
11. Any unmarried woman resident in the State, may make complaint before a justice, under the statute, against the father of her bastard child, without regard to the place where the child was born.—*Cooper v. The State*.....316
12. The court in ordering the father of such child to make certain payments for its maintenance, should not direct an execution to issue in case of non-payment.....*Ibid*.
13. Upon an order for such payments, a *scire facias* or an action of debt may be sustained by the party entitled to the money.....*Ibid*.

BEARER.

See PROMISSORY NOTES, 17.

BEST EVIDENCE.

See EVIDENCE, 2, 7, 13, 14, 23, 27.

BETTING.

See WAGERS.

BILL OF EXCEPTIONS.

See RECORD, 2.

BILL OF LADING.

See CARRIERS, 1. EVIDENCE, 9, 10.
SALE OF GOODS, 4.

BILL OF SALE.

See RIGHT OF PROPERTY, TRIAL OF, 3.

BOARD OF COUNTY COMMISSIONERS.

See COUNTY COMMISSIONERS, BOARD OF.

BOND, SINGLE.

See EVIDENCE, 5, 6 LEX LOCI, 2.
PLEADING, 2. VENDOR AND PURCHASER, 3, 8.

1. An assignment on a sealed note of the balance due, (part having been paid and the payment indorsed,) was held good.—*Barnett et al. v. Spencer*.....206
2. A sealed note given to an agent by the claimant of a tract of land, in consideration of the payee's agreement to abandon the prosecution of a claim to the land, which he had undertaken to prosecute for his principal, is fraudulent and void...*Ibid*.
3. The general issue, or a plea of failure of consideration, to an action of debt on a sealed note by the payee, does not put in issue the plaintiff's property in the note.—*Harris et al. v. Smith*.....550
4. The payee's possession of a note, notwithstanding an indorsement on it in full, is *prima facie* evidence that the note is his.....*Ibid*.

BOND WITH CONDITION.

See APPEAL, 7, 10, 11. ARBITRATION, 6, 7. ATTACHMENT. BASTARDY, 3, 4. EXECUTORS AND ADMINISTRATORS, 2, 3. JUSTICE OF THE PEACE, 3, 5, 6, 8, 13, 14. NE EXEAT. PLEADING, 6. PRACTICE, 1. PRISON-LIMITS. SHERIFF'S BOND.

BOOKS.

See EVIDENCE, 15.

BOUNDARIES.

See EVIDENCE, 19. OHIO RIVER. SCHOOL DISTRICT.

C

CANAL, WABASH AND ERIE.

See WABASH AND ERIE CANAL.

CAPIAS AD RESPONDENDUM.

1. The motion of a defendant to set aside a *capias ad respondendum*, must be made as early after the return of

the writ as is convenient and practicable, according to the rules of the rules of the court; and before he has taken any step in the defense of the suit.—*Wibright v. Wise*...137

2. If a *capias ad respondendum*, concluding with the words "Witness A. B., clerk of the ——— Circuit Court," &c., be in every respect formal, except that it have not the clerk's signature at the close of the teste—it is sufficient under the statute.*Ibid.*

CARRIERS.

1. The declaration in assumpsit against a common carrier by water, was for the non-delivery of a certain quantity of salt and steel, which he had received to be carried, &c. *Held*, that a bill of lading in which the defendant acknowledged the receipt, not only of the salt and steel but also of certain other articles—was not objectionable as evidence on the ground of variance.—*Wallace v. Vignol*.....260
2. *Held*, also, that as the suit was for the non-delivery of the goods, and was not brought until two years after the defendant had received them—it was no defense to the suit, that the river on which the goods were to be carried, was, for four months after they were received, too low for the navigation of the defendant's boat.*Ibid.*
3. *Held*, also, that the measure of damages in such case, if the plaintiff succeed, is the wholesale value of the goods at the place to which they were to be carried—deducting the price of freight.....*Ibid.*
4. To sustain a suit against a carrier for an injury to the goods carried, the goods must belong to the plaintiff at the time of the injury.—*Law v. Hatcher*.....364

CHALLENGE.

1. A petit juror, in a criminal case, being challenged, and examined on his *voire dire*, testified that he had formed and expressed an opinion as to the guilt of the defendant from report; that he had heard no witness as he knew of speak of the transaction; that he lived 18 miles from the neighborhood of the defendant, and had not been there since the alleged commission of the offense. *Held*, that the challenge was not sustained.—*McGregg v. The State*...101

2. A juror may be asked on the *voire dire*, in a civil as well as in a criminal case, whether he has formed or expressed an opinion on the merits of the cause.—*Maize v. Sewell*...447
3. On the trial of an indictment, three jurors may be challenged peremptorily on the part of the State, but no more.—*Wiley v. The State*....458

CHANCERY.

See ASSIGNMENT. DIVORCE, 2. EXECUTORS AND ADMINISTRATORS, 5. EXHIBITS. FRAUDULENT CONVEYANCE. INFANT, 2. JURISDICTION, 4. MORTGAGE, 7, 8, 9. NEW TRIAL, 1. VENDOR AND PURCHASER, 1.

1. The proper mode, under our statute, of objecting to the validity of a plea to a bill in chancery, is by a motion to have the plea set down for argument; but the mere circumstance that the plea was set down for argument on a demurrer to it, instead of on such a motion, cannot be assigned for error.—*Raymond et al. v. Simonson*.....77
2. A court of chancery may take the opinion of a jury as to any of the facts in controversy between the parties, whenever it thinks proper to do so.—*Ray et ux. v. Doughty et al.*...115
3. A, being indebted to B, absconded, leaving personal property in C's hands. C, afterwards, bought part of the property at an execution-sale, paid debts of A with another part of the property, and retained the residue for a debt due to himself from A. *Held*, that without proof of fraud, B could not sustain a suit in chancery against A and C; but that he might have attached A's property in C's hands, and might also, by summoning C as a garnishee, have secured any debt due by the latter to A.—*West v. McCarty et al.*.....244
4. A bill in chancery containing a claim against a defendant in his individual capacity, and another against him as an heir for the debt of his ancestor, may be objected to for multifariousness; but the objection must be made before the defendant has answered the bill.—*Bryan v. Blythe et al.*.....249
5. To entitle a party to the aid of a court of chancery to compel an account of rents and profits, he must connect with his cause of complaint some peculiar equitable ground for

- the interference of the court, such as fraud, &c.—*Grimes et al. v. Wilson et ux.*.....331
6. Two persons joined in a bill in chancery, each having a separate claim against the defendant. One of the complainants, on account of his infancy, had a right to sue in chancery, but the other had no such right. *Held*, on demurrer, that the bill was insufficient. *Held*, also, that on sustaining the demurrer in such case, the bill should not be dismissed as to the infant, but should stand over in order that he might strike the name of the other complainant from the bill.....*Ibid.*
7. The jurisdiction of courts of equity, in matters of account, has been gradually enlarged, until it has become concurrent with that of common law courts, to an almost unlimited extent, over the mutual dealings of parties, even when those dealings consist of items of a purely legal character.—*Cummins v. White et al.*.....356
8. Courts of equity, however, have no jurisdiction over accounts where there is but one item on a side, or where there is no mutuality of dealing and a discovery is not required.....*Ibid.*
9. In matters of account which are mutual and complicated, or where a discovery is required, or a multiplicity of suits will be avoided, or the remedy at law is not full and adequate, or fraud, accident or mistake is connected with the subject, courts of equity have jurisdiction; but where none of these characteristics exist, the mutual dealings of the parties result in causes of action, matters of set-off, &c., cognizable only at law.....*Ibid.*
10. Courts of equity sometimes protect a creditor against the effects of the insolvency of his debtor, where there are mutual credits and the law furnishes no adequate remedy, by decreeing a set-off.....*Ibid.*
11. A defendant in a suit at law, who confesses judgment reserving equity, &c., has no right to proceed in chancery for his demand against the plaintiff, which he would not have had without such reservation...*Ibid.*
12. An objection that the Court, whether of law or equity, has no jurisdiction over the subject-matter in controversy, may be made at any stage of the suit.....*Ibid.*
13. If a party, with full knowledge of the facts, voluntarily pay an unjust debt which is attempted to be enforced against him by legal proceedings, he can not afterwards recover it back either at law or in equity; *a fortiori*, if a debt thus paid had been previously in part paid, the first payment can not be recovered back.....*Ibid.*
14. If a note upon which the maker has confessed judgment, was obtained by fraud or mistake, he may obtain relief in a court of chancery. *Ibid.*
15. A suit in chancery lies for an account of *mesne* profits after a recovery in ejectment, if the bill claims a discovery and shows a right to it. —*Elliott et al. v. Armstrong.*.....421
16. Equity relieves against mistakes, as well as against fraud, in a deed or other written contract; and parol evidence is admissible to prove the mistake, though it be denied in the answer. But equity will not interpose in such case, unless there be the clearest and most satisfactory proof of the mistake, and of the agreement between the parties.—*Gray v. Woods.*.....432

CLAIM.

See RIGHT OF PROPERTY, TRIAL OF, 4.

COLLECTOR'S DEED.

See SALE FOR TAXES, 2, 3, 4.

COLLOQUIUM.

See SLANDER, 11.

COMMISSIONS.

See EXECUTORS AND ADMINISTRATORS, 8.

COMMON LAW.

The common law, so far as it does not interfere with the statutes of a State, must be presumed to be in force within such State.—*Titus v. Scantling et ux.*.....89

COMPANY, UNINCORPORATED.

1. An unincorporated company can not sue in the name of the firm.—*Davis v. Hubbard et al.*.....50
2. If an unincorporated company sue in the name of the firm, the suit will be dismissed on motion.—*Hughes v. Walker et al.*.....50

3. When a suit is properly brought by the persons composing the firm of *A & Co.*, and a note payable to the firm is filed as the cause of action, the plaintiffs should enter a suggestion on record, that the promise was made to the plaintiffs by the name of *A & Co.*.....*Ibid.*

COMPETENCY.

- See RIGHT OF PROPERTY, TRIAL OF, 2.
WITNESS, 1, 3 to 7, 9 to 11.

COMPLAINT.

- See FORCIBLE ENTRY AND DETAINER, 1.

COMPUTATION OF TIME.

- See TIME, COMPUTATION OF.

CONCURRENT ACTS.

- See COVENANTS. VENDOR AND PURCHASER, 13, 14.

CONDITION PRECEDENT.

- See PROMISSORY NOTES, 11.

CONFESSION OF JUDGMENT.

- See JUSTICE OF THE PEACE, 10, 11.

CONSIDERATION.

- See BOND, SINGLE, 2. COUNTY, 2. COVENANTS. PATENT RIGHT, 2. PLEADING, 21. PROMISSORY NOTES, 3 to 7, 9, 10, 11, 13, 16, 19. VENDOR AND PURCHASER, 3, 7, 8.
1. Declaration against the defendant for not performing certain work agreeably to his contract, without showing that he was to have anything for the work, contains no cause of action.—*Poundstone v. Newark et al.*.....173
2. Although a note given in part payment of certain real estate, be due before the time appointed for the execution of the deed, yet, if suit on the note be not commenced until after the time when the deed was to be executed, the defendant may plead in bar that the plaintiff did not, on the day fixed by the contract for the purpose, execute or offer to execute the deed.—*Cunningham v. Gwinn.*.....341
3. If a title-bond be executed in such case bearing the same date with the note, they constitute one contract, and the note is subject to the same defense as if it showed, on its face,

the consideration for which it was given.....*Ibid.*

4. The want of failure of consideration is no defense to an action of debt on a judgment rendered in this State by a justice of the peace.—*Brown v. Trulock.*.....429

CONSTABLE.

- See INDICTMENT, 4, 5, 6.

CONSTITUTIONAL LAW.

- See DIVORCE, 2. FORMER ACQUITTAL. JURY, 5, 6. MERCHANDISE, FOREIGN. RECORDER, 1. SEATS OF JUSTICE. WABASH AND ERIE CANAL, 2.

CONTINUANCE.

- The plaintiff's withdrawing of a general demurrer to a plea in bar, and filing a replication in denial of the plea, entitle the defendant, under the statute, to a continuance.—*Taylor et al. v. Heffner.*.....387

CONTINUANDO.

- See TRESPASS, 4.

CONTRACT.

- See CONSIDERATION, 1, 2, 3. JOINT AND SEVERAL. PLEADING, 7.
1. A person contracted to work for a year at a certain sum per month; but after working three months and ten days, he left his employer and sued him for the work thus done. It was proved that the defendant had manifested a disposition to get the plaintiff to leave him, and had said after the plaintiff was gone, that he was glad of it as the plaintiff was worth nothing. *Held*, that the action was not sustained.—*De Camp et al. v. Stevens.*.....24
2. A contract by which two persons by name, describing themselves as trustees of a certain school district, agree that the "trustees" shall pay a teacher a certain sum for his services, and which is executed by those persons in their own names, is binding upon them individually.—*Wiley v. Shank et al.*.....420

CONTRACT, RESCINDING OF.

- See CONTRACT, 1. INFANT, 4.

CONVERSION.

- See TROVER, 1, 2, 3, 6.

CONVEYANCE.

See EVIDENCE, 30, 31. FRAUDULENT CONVEYANCE. MORTGAGE. SALE FOR TAXES, 2, 3, 4. SHERIFF'S DEED. TREATIES, 2.

CONVICTION.

See FORMER CONVICTION.

COPIES.

See EVIDENCE, 11, 18, 23, 27. EXECUTION, 2. JUSTICE OF THE PEACE, 19. SALE FOR TAXES, 1.

CORPORATION.

See COMPANY, UNINCORPORATED.

1. A corporation legally created in any one of the States, may sue in the courts of this State.—*The Guaga Iron Company v. Dawson*.....202
2. If the declaration aver that the plaintiffs are a corporation by virtue of a certain statute, a plea denying the existence of the statute is, in substance, a denial of the existence of the corporation.....*Ibid.*
3. A person sued by a corporation on a contract made with the plaintiffs as a corporation, is not estopped from denying that the corporation existed at the time the suit was commenced. *Quere*, whether he is estopped from denying the existence of the corporation at the date of the contract.....*Ibid.*
4. The declaration in a suit brought in a corporate name, need not aver the plaintiffs to be a corporation.—*Harris v. The Muskingum Manufacturing Company*.....267
5. The circumstance that a person is a member of an incorporated company, gives him no authority to release a debt due to the corporation.....*Ibid.*
6. A plea to a suit by a corporation, stating that the corporation had been dissolved by the acts of its members, without showing the causes and manner of the dissolution, is insufficient.....*Ibid.*

CORPSE, DISINTERMENT OF.

1. The disinterment of a corpse is indictable, if it be done without either the consent of the deceased given in his life-time, or of his near relations given subsequently to his death.—*The State v. McClure*.....328
2. The indictment, in such case, need

not allege the disinterment to be unlawful.....*Ibid.*

CORYDON STEAM-MILL COMPANY.

In a suit by *The Corydon Steam-Mill Company* for an installment on stock subscribed for in the company, the declaration should state by whom the subscription was received, and should allege that notice to pay the installment had been given agreeably to the charter.—*The Corydon Steam-Mill Company v. Pell*.....472

COSTS.

See APPEAL, 5. ARBITRATION, 13. NEW TRIAL, 7. SECURITY FOR COSTS.

Sureties of the peace were obtained before a justice, but the Circuit Court refused to continue the defendant under recognizance. *Held*, that the complainant was not liable for costs.—*The State v. Abrams*...440

COUNSEL FEES

See TRESPASS, 7.

COUNTS, REJOINDER OF.

See INDICTMENT, 2.

COUNTY.

1. A county that has illegally collected taxes in another, is liable for the money to the individuals from whom it was collected, but not to the latter county itself; and a statute passed subsequently to the collection, directing the county first above named to pay the money to the other, can not affect the rights or liabilities of the parties.—*The Board of Commissioners, &c. v. The Board of Commissioners, &c.*.....256
2. A county order issued under these circumstances by the county which had made the collection in favour of the other county, is without consideration.....*Ibid.*

COUNTY COMMISSIONERS, BOARD OF.

See APPEAL, 1. RECORDER.

An order of the board of county commissioners, giving the collector of the county revenue a longer time for payment of the revenue of the year than the law prescribes, is without authority and wholly inoperative.—*Coman et al. v. The State*.

241

COUNTY ORDER.

See COUNTY, 2.

COUNTY REVENUE.

See COUNTY COMMISSIONERS, BOARD OF. EVIDENCE, 14.

COVENANTS.

Where, in an agreement between two parties, there are covenants to be performed by each at the same time and place, the party who sues must aver that he has performed or offered to perform his part, or show a legal excuse for his not doing so.—*Vankirk v. Talbot*.....367

CRIMINAL CASES.

See JURY, 5, 6. NOLLE PROSEQUI.

The prisoner should be acquitted, in all criminal cases, unless the testimony satisfy the jury, beyond a reasonable doubt, that he is guilty. *Hiler v. The State*.....552

CROPS.

See PRE-EMPTION, RIGHT OF.

D

DAMAGES.

See PRACTICE, 1. SLANDER, 1, 6, 7, 9. TRESPASS, 7, 8, 15, 16, 18.

DAMAGES, MEASURE OF.

See CARRIERS, 3. PRISON LIMITS, 4.

DEATH.

See ABATEMENT, 4. JUSTICE OF THE PEACE, 13, 14.

DEBTOR AND CREDITOR.

See CHANCERY, 3, 10. FRAUDULENT CONVEYANCE. INSOLVENT DEBTORS. MORTGAGE. PRINCIPAL AND SURETY.

DECREE.

See EXECUTORS AND ADMINISTRATORS, 4.

DEEDS.

See EVIDENCE, 30, 31. FRAUDULENT CONVEYANCE. MORTGAGE. SALE FOR TAXES, 2, 3, 4. SHERIFF'S DEED. TREATIES, 2.

DEFAULT, JUDGMENT BY.

See PRACTICE, 1, 2, 12. RECORD, 1.

1. In the case of a judgment by default against a defendant, the writ

and return are a necessary part of the record.—*Bliss v. Wilson*.....169

2. The record in such case must show that the defendant had notice of the suit, or the judgment is a nullity.

Ibid.

3. A judgment can not be taken against the defendant by default, if there are pleas in bar on file, upon which issues are joined.—*Harris v. The Muskingum Manufacturing Company*...267

DEFENDANT.

See WITNESS, 2.

DEMAND.

See DISSEISIN. LIMITATIONS, STATUTE OF, 3. PROBATE COURT. VENDOR AND PURCHASER, 19.

DEMURRER.

See ATTACHMENT, 1. ESTOPPEL, 2. PRACTICE, 7, 10.

DEMURRER TO EVIDENCE.

On a demurrer to evidence, the facts and conclusions which the evidence conduces to prove are admitted, and the Court may draw from the evidence every inference which a jury could have reasonably drawn from it.—*Doe d. Wilkins v. Rue et al*...263

DEPOSITS IN BANK.

1. The receiving of bank notes in a bank on special deposit, is as much a bank transaction as the receiving of them on general deposit; but the nature of these two kinds of deposits is very different.—*Coffin v. Anderson*.....395

2. When bank notes are received in bank on general deposit, they become the property of the bank, and their amount is a debt payable on demand by the bank to the person entitled to it. If payment in such case be afterwards refused, the creditor's only remedy is an action of debt or *assumpsit* against the bank.

Ibid.

3. But if the deposit of the notes be special, there is no change of property, and the deposit is nothing but a bailment. The conversion of such a deposit by the cashier is a *tortious* act, for which he is individually liable in an action of *trover*.*Ibid.*

DEPOSITIONS.

See WITNESS, 5.

1. The deposition of a prosecuting attorney of one of the circuits was

- taken, under the statute, to be read in evidence on the trial of a cause in another circuit, if the witness should not be able to attend. *Held*, that the circumstance that the official duties of the witness, at the time of the trial, required his attendance at a different place from that of the trial, was *prima facie* sufficient to authorize the admission of the deposition.—*Coons v. Thompson*.....8
2. A notice to take depositions may be served on the attorney, and the service may be proved by his written acknowledgment.—*Coffin v. Anderson*.....395
4. A justice of the peace has no authority, in the case of a distress warrant, to render a judgment for the amount of rent supposed to be due.....*Ibid.*
5. The party procuring a distress warrant to issue is answerable for the consequences, whether the rent claimed be or be not of such a nature as to authorize the warrant. *Ibid.*
6. If a landlord distrain and sell goods for rent before the same is due, he is liable by statute to an action of trespass on the case.....*Ibid.*

DISTRIBUTION.

See DESCENTS. LEX LOCI, 1.

DESCENTS.

Under the statute of 1831, regulating descents, the widow of a person dying intestate without issue, leaving a father, mother, brothers or sisters or their descendants, is entitled to only \$100 of his personal estate, and one-third of that part of it which remains for distribution.—*Hunt et ux. v. Jordan, et al*.....532

DEVASTAVIT.

See EXECUTORS AND ADMINISTRATORS, 11, 14.

DILIGENCE.

See EVIDENCE, 30. NEW TRIAL, 1. PROMISSORY NOTES, 1, 15.

DISSEISIN.

In an action of disseisin, it is not necessary to prove a notice to quit or a demand of possession, if there be no privity between the parties.—*Bowser et al. v. Warren*.....522

DISTRESS.

1. To prove the issuing of a distress warrant by a justice of the peace on a particular day, the entries on the subject in the justice's docket (the docket being proved,) are competent evidence.—*Richardson v. Vice*, 13
2. If a distress warrant prove to be lost, parol evidence of its contents, of its return, and of the constable's proceedings under it, is admissible. *Ibid.*
3. It is not necessary to the liability of a person for improperly taking out a distress warrant that he should have made an affidavit in order to procure the warrant.....*Ibid.*

DIVORCE.

1. A husband can not claim a divorce on account of the adultery of his wife, if he cohabit with her after his knowledge of the offense.—*Phillips v. Phillips*.....131
2. According to the statutes of 1833 and 1835, the courts of chancery have exclusive jurisdiction in cases of divorce; the consequence is, that the associate judges can not, constitutionally, determine such a case in the absence of the circuit judge.—*Smith v. Smith*.....132

DOCKET FEE.

1. If an appeal to the Circuit Court from the judgment of a justice, be dismissed by the appellant in vacation under the statute of 1834, before the defendant has appeared, the appellant is not subject to the payment of a docket fee. And the mere entry in the case of an attorney's name for the defendant on the issue-docket, is not an appearance.—*Cassady v. Reid*.....173
2. As the amount in controversy in such case (relative to the allowance of a docket-fee) is less than \$20.00, the Supreme Court has no jurisdiction of the cause.....*Ibid.*

DOUBT.

See CRIMINAL CASES.

DOWER.

1. The term *messuage*, as used in the statute regulating dower, may include a few acres of land adjacent to a dwelling-house, but not a whole farm.—*Grimes et al. v. Wilson et ux.*.....331

2. If a widow enter upon the lands of her deceased husband, other than "the mansion-house and messuage thereunto belonging," and appropriate the proceeds to her own use—she is a wrong-doer, and amenable to the proprietor of the land for the rents and profits..... *Ibid.*

E

ELECTION.

- See ARBITRATION, 11. INDICTMENT, 3. VENDOR AND PURCHASER, 17.

EMBLEMENTS

- See PRE-EMPTION, RIGHT OF.

EQUITABLE LIEN.

- See LIEN.

EQUITY.

- See CHANCERY.

ERASURE.

- See INQUIRY, WRIT OF, 2.

ERROR.

- See ABATEMENT, 4. CHANCERY, 1. EVIDENCE, 16. NOLLE PROSEQUI, 2. PRACTICE, 7.

If a suit be brought to the Supreme Court a second time on appeal or writ of error, the proceedings since the cause was remanded can only be examined. — *Hobson v. Doe d. Harper et al*.....487

ESCAPE.

- See JUSTICE OF THE PEACE, 24. PRISON LIMITS.

ESTOPPEL.

- See ATTACHMENT, 1. CORPORATION, 3.

1. When a party makes admissions in the condition of a writing obligatory, he is estopped from denying, in a suit on the obligation, the facts thus admitted. — *Trimble et al. v. The State*.....435
2. If the declaration show that the defendant is estopped to plead the facts contained in his plea, the plaintiff need not reply the estoppel but may demur.....*Ibid.*

ESTRAY.

- See INDICTMENT, 7.

EVIDENCE.

See APPEAL, 2, 7. ARBITRATION, 9. ASSUMPSIT, 2. BOND, SINGLE, 4. CARRIERS, 1. CHANCERY, 16. CRIMINAL CASES. DEMURRER TO EVIDENCE. DEPOSITIONS. DISTRESS, 1, 2. EXECUTION, 2. EXECUTORS AND ADMINISTRATORS, 9. EXHIBITS. FORMER CONVICTION. GAMING, 1. INDIANAPOLIS, 1. INQUIRY, WRIT OF, 1, 2, 3. JUDGMENT. JURISDICTION, 3. JUSTICE OF THE PEACE, 7, 17, 19. MARRIAGE. MONEY HAD AND RECEIVED, 1, 2. MORTGAGE, 2 to 6, 11, 12. ONUS PROBANDI. OVERSEERS OF THE POOR, 2, 3. PARTIES, 1. PARTNERS. PRACTICE, 5, 6. PROMISSORY NOTES, 16, 19. RIGHT OF PROPERTY, TRIAL OF, 3. SALE FOR TAXES. SHERIFF'S DEED. SHERIFF'S SALE, 1, 2. SLANDER, 1, 2, 4, 6, 7, 9, 12, 13. TREATIES, 1, 3. TRESPASS, 2, 6, 9, 15 to 19, 21. TROVER, 1, 6, 7. TRUST, 2, 3. VARIANCE, 1 to 4, 8. VENDOR AND PURCHASER, 7. WITNESS.

1. Evidence not relevant to the issue is inadmissible.—*Carlton v. Litton*..1
2. The contents of an instrument of writing can not be proved by oral testimony, unless the absence of the instrument be first accounted for.

Ibid.

3. If a party wish to introduce a written instrument in evidence, which is in the hands of a third person, he must take out a *subpoena duces tecum*.

Ibid.

4. *Scire facias* by a justice of the peace, to show cause why an execution should not issue on a judgment, rendered by his predecessor in office against the defendant. Plea, payment. Judgment for the plaintiff, and an appeal to the Circuit Court. *Held*, that, on the trial in the Circuit Court, the defendant might prove by *parol* that he had paid the judgment to the justice before whom it was rendered—it being proved that, at the time of the payment, the justice was in office and had the docket in his possession, but that he had made no entry in it of the payment.—*Morrison v. King*.....125
5. The possession of a bond by a third person, is a strong circumstance to prove that he is authorized by the obligee to collect the money.—*Hackleman et al. v. Moot*.....164
6. In a suit on a bond against the prin-

- cipal and his sureties, the acknowledgments of the principal may be proved to show his own liability; but *quære* whether they can be considered as evidence to affect the other defendants.....*Ibid.*
7. If the contents of letters be the subject of inquiry, the letters themselves must be produced or their absence accounted for.....*Ibid.*
8. If an execution be proved to be lost, its contents may be proved by parol evidence.—*Nooe v. Higdon*.....184
9. A bill of lading with no qualifying terms is *prima facie* but not conclusive evidence, that the goods consigned belong to the consignee.—*Harrison et al. v. Hixson*.....226
10. The consignor of goods, in an action against the carrier for their loss, may introduce the bill of lading to prove the delivery of the goods, and may then show by parol testimony, that the goods belong to himself and not to the consignee.....*Ibid.*
11. A transcript of the record of a judgment is not admissible as evidence, unless it have a *placita* and be legally authenticated.—*Doe d. Maguire v. Smith*.....228
12. If to an action on a note for the payment of money, the defendant plead a failure of the consideration, setting out the contract under which the note was given—his proof of the contract must agree with the description of it in the plea.—*Gordon et al. v. Cowger*.....231
13. The rule of law, that the best evidence which the nature of the case admits of must be produced, applies as well to secondary as to primary evidence.—*Coman et al. v. The State* 241
14. If in an action against the collector of county revenue, the defendant do not produce the duplicate of the assessment roll, upon notice given him to produce it—the assessment roll in the clerk's office is the next best evidence of the contents of the duplicate, and must be produced or its absence accounted for, before parol evidence of the contents of the duplicate can be received.....*Ibid.*
15. The plaintiff's books of account in which he has charged the items for which he sues, are not admissible evidence to support his demand.—*De Camp et al. v. Vandagriff*.....272
16. If evidence be admitted in the Circuit Court without objection, its admission can not afterwards be assigned for error.—*Perkins v. Smith* 299
17. To prove what the question in issue in a previous suit was, the complete record of the suit, and not a detached special plea filed in it, must be produced.—*Foot v. Glover*.....313
18. The seal of the general land office, and the signature of the commissioner thereof, to copies of papers, required by law to be deposited in that office, *prima facie* prove themselves.—*Harris v. Doe d. Barnett et al.*.....369
19. If from the expressions in a grant, &c., respecting real estate, it is doubtful to what object it refers, or it is evident that a mistake in the description of the boundaries has been committed, or if the boundaries be insufficiently described in it, extrinsic evidence, even parol, is admissible to explain the instrument...*Ibid.*
20. The oath of one of several plaintiffs to the loss of an instrument of writing, is sufficient to let in secondary evidence of its contents...*Ibid.*
21. A paper purporting to be an answer to a bill of discovery, and to have been sworn to before a magistrate in *Kentucky*, was offered in evidence in a suit at law. *Held*, that to render the paper admissible evidence as an answer, there should be proof of its having been filed as such, of the signature of the party to it, and of the officer to the attestation. *Held*, also, that to its admission as a voluntary affidavit, proof of the party's signature and of its having been legally sworn to, was necessary; and that as a written acknowledgment of the party, proof of his signature was necessary to its admission.—*Doughton v. Tillay et al.*.....433
22. *Quære*, whether the admissions of one partner, made after the dissolution of the partnership, are admissible evidence against the firm?...*Ibid.*
23. In a suit against a justice for not filing in time the papers in an appeal, the best evidence of the justice's judgment is his record or a certified copy of it—not a copy, certified by the clerk, of the transcript filed in the Circuit Court.—*Mill v. Barnes*.....38
24. If an instrument of writing set out in the pleadings be offered

- in evidence, its execution must be proved.—*Smith v. Scantling*.....443
25. If the plaintiff's lessor in ejectment claim title to the premises, as a purchaser under a judgment and execution against the defendant's grantee, the grantee's confessions made subsequently to the judgment, tending to invalidate the defendant's deed to him, are inadmissible as evidence for the defendant.—*Doe d. Maxwell v. Moore*.....445
26. To a suit on a promissory note, the defendant pleaded payment to a third person conformably to the plaintiff's written order, and set out the order in the plea. The replication, not sworn to, denied payment. *Held*, that under the statute, the defendant might give the order in evidence without proving its execution.—*Early v. Patterson*.....449
27. *Semble*, that the grantee of a registered deed can not give a certified copy of it in evidence, without accounting for the absence of the original.—*Hobson v. Doe d. Harper et al.*.....487
28. In *February*, 1837, *H.* sued *S.* in the *White Circuit Court* in *assumpsit*. Plea, *non-assumpsit*. On the trial, *S.* offered to prove that in *March*, 1837, he sued *H.* before a justice on two promissory notes; that *H.* proved in that suit, as a set-off, the demand now sued for; that the verdict and judgment being against *H.* he appealed to the *White Circuit Court*; and that the appeal was still pending. *Held*, that the evidence was inadmissible.—*Sherwood v. Hammond*.....504
29. A patent for *United States* land which appears to be signed by the president, countersigned by the commissioner of the general land office, and verified by the seal of that office, is admissible as evidence without proof of its execution.—*Bowser et al. v. Warren*522
30. A deed with subscribing witnesses is not admissible in evidence on proof of the grantor's hand-writing, unless the absence of the witnesses be accounted for, and due diligence have been used, without effect, to procure proof of their hand-writing.....*Ibid.*
31. A conveyance of real estate, purporting to be executed to the party offering it in evidence, is not admissible, though it appear to have been

acknowledged and recorded, unless its execution be proved.....*Ibid.*

EXECUTION.

- See AMENDMENT. EVIDENCE, 8. JUSTICE OF THE PEACE, 23. MORTGAGE, 2, 3, 4. PARTIES, 2. PLEADING, 6. REPLEVIN, 9. RIGHT OF PROPERTY, TRIAL OF. SALE OF GOODS, 5. SHERIFF'S DEED. SHERIFF'S SALE. TRESPASS, 1, 2.
1. One execution can not be issued upon two separate judgments.—*Doe d. Wilkins v. Rue et al.*.....263
 2. An execution when returned is a record, and may be proved by a copy certified under the seal of the Court.—*Hobson v. Doe d. Harper et al.*.....487
 3. A *fiery facias* in *A's* favour was delivered to the sheriff, but, before it was levied, another in favour of *B* was delivered to a constable and levied. *A's* execution was then levied on the same property. *Held*, that if *B's* execution be duly proceeded into a sale, it has the preference; but if instead of being so perfected, it be recalled, the lien of *A's* execution stands in force.—*McCall v. Trevor et al.*.....496

EXECUTORS AND ADMINISTRATORS.

- See ARBITRATION, 14. FRAUDS, STATUTE OF, 4. FRAUDULENT CONVEYANCE, 2. JUSTICE OF THE PEACE, 14. LAND OFFICE CERTIFICATE. MORTGAGE, 8, 9. PARTIES, 2. PLEADING, 12.
1. If a widow continue in the possession of her deceased husband's goods and use them as her own, she is liable as an executrix *de son tort*.—*Hawkins v. Johnson*.....21
 2. An administrator, in the case of an appeal from a judgment against his intestate, executed an appeal-bond. The appellee obtained a judgment on the appeal, to be levied of the intestate's goods. In an action on the appeal-bond, the defendant proved that the estate, at the time of the judgment on appeal, was insolvent. *Held*, that the plaintiff could not recover.—*Evans v. Adams et al.*.....54
 3. *Quære*, whether an administrator, who appeals from a judgment against his intestate, need execute an appeal-bond; or whether such bond, if executed, be obligatory?
Ibid.

4. The administrator of a guardian was sued in chancery by the administrator of the ward, for money received by the guardian from the administrator of the ward's father, as part of the ward's distributive share of his father's estate. *Held*, that a decree for the complainant in such case, should be against the goods of the intestate, and not *de bonis propriis*.—*Raymond et al v. Simonson*.....77
5. The final settlement of the accounts of executors and administrators in the Probate Court, is considered *primi facie* correct; and the settlement can only be interfered with, by a Court of chancery, in very clear cases of mistake or fraud.—*Ray et ux. v. Doughty et al*.....115
6. The administrator of an administrator is not administrator of the first intestate, nor has he a right to administer any of the goods of such intestate; but it is his duty to make a settlement with the Probate Court, of the business done by his intestate in the first administration.....*Ibid.*
7. If one of the co-administrators of an estate die, the administrator of the deceased is the proper person to pay any balance due to the estate from such co-administrator; and the surviving co-administrator is the proper person to receive it.....*Ibid.*
8. It appeared, on the settlement of an estate in the Probate Court, that the payments which had been made by the administrator, amounted to \$3,010. *Held*, that an allowance to the administrator of \$180, as commissions, was not objectionable as being too high.....*Ibid.*
9. The Probate Court, on the settlement of an estate of which *A* and *B* were administrators, had charged *A* with only \$3,010, although the inventory and sale-bill signed by both the administrators amounted to a much larger sum. *Held*, that the record of the Probate Court, in the absence of all proof except the inventory and sale-bill, was conclusive proof that the sum charged to *A* was the whole amount that had come into his hands to be administered. *Ibid.*
10. An executor may be passive, by not obstructing his co-executor from obtaining the assets, without making himself responsible even to the creditors of the testator.....*Ibid.*
11. The widow and administratrix of *A*, being in the nineteenth year of her age, received from her co-administrators, *B* and *C*, certain goods as her legal portion of her deceased husband's estate. *Held*, that in case the widow committed a devastavit of the goods, and it be considered that *B* and *C*, by the delivery of them to her, had contributed to that devastavit, *B* and *C* may be liable to the creditors of the intestate for such delivery of the goods, but they can not be liable for it to the widow herself.....*Ibid.*
12. *Held*, also, that whilst the letters of such infant administratrix remained unsuspended and unrevo-
ked, the payments made to her by the debtors of the intestate, and the delivery of goods of the estate to her by her co-administrators, are to be considered in the same light as if her authority were undisputed. *Ibid.*
13. The granting of letters of administration is a *judicial* act, and where the Court granting them has jurisdiction, individuals and Courts of justice are bound to respect the authority of the letters, and to presume *omnia rite acta*.....*Ibid.*
14. An administratrix took into her possession a part of the assets with the knowledge of her co-administrator, and converted them to her own use. *Held*, that though the administratrix was a minor, her co-administrator was not liable for the devastavit.....*Ibid.*
15. An administrator is liable for any interest he may have collected on the debts due to the estate.....*Ibid.*
16. *A* obtained a judgment before a justice of the peace against *B*, and the defendant appealed to the Circuit Court. Whilst the appeal was pending, the suit abated by the death of *A*. *Held*, that the administrator of the deceased might revive the suit.—*Adams v. Evans*.....247
17. *B* had filed before the justice, in the above-named suit, an account against *A* as a set-off, which amounted to more than *A*'s demand; and on the trial in the Circuit Court (the suit having been revived, &c.), the jury gave a verdict in *B*'s favour for a certain sum, without finding the amount of assets in the administrator's hands. *Held*, that the omission to find the amount of

- assets was not, in this case, any objection to the verdict.....*Ibid.*
18. Assumpsit against an administrator on a promissory note executed by the intestate. Pleas, non-assumpsit and failure of consideration. *Held*, that the judgment against the defendant in such case, should not be *de bonis propriis*, but to be levied out of the assets of the intestate in the defendant's hands to be administered, if he have so much, but if not, then the costs out of the defendant's own goods.—*Priest v. Martin*.311
19. The general issue and a special plea in bar were filed, in a justice's Court, to a suit by an administratrix, and the cause was then transferred to the Probate Court. *Held*, that the defendant could not afterwards deny the character in which the plaintiff sued.—*Scanland v. Ruble*481

EXHIBITS.

When exhibits are the foundation of a suit in chancery, and their execution is not admitted, they must be proved either by depositions, or *viva voce* at the hearing.—*Sandford v. Shelby*.....134

F.

FORCIBLE ENTRY AND DETAINER.

1. The complaint in a case of forcible detainer, must show that the land is within the county, and that the detainer is unlawful.—*Boxley et al. v. Collins*.320
2. The verdict for the complainant in such case, must state that the premises are detained *by force*.....*Ibid.*

FORECLOSURE.

See MORTGAGE, 1, 7, 8, 9.

FOREIGN MERCHANDIZE.

See MERCHANDIZE, FOREIGN.

FORGERY.

See BANK NOTES. TROVER, 7.

FORMER ACQUITTAL.

1. A judgment of acquittal by a justice of the peace, on a charge of an assault and battery with intent to murder, is *coram non judice* and void.—*The State v. Odell*.....156

2. A plea of such acquittal, to an indictment for an assault and battery alleged to be the same offense with that determined by the justice, can not be sustained.....*Ibid.*
3. Although the Court may have improperly prevented the State from entering a *nolle prosequi*, or have misdirected the jury, or have admitted illegal or rejected legal evidence—or the verdict be against evidence—the verdict and judgment of acquittal on an indictment, if fairly obtained, are conclusive; and the defendant can not be again put in jeopardy for the same offense.—*The State v. Davis*.345

FORMER CONVICTION.

1. On the trial of an indictment for an assault and battery, the defendant, in order to prove a former conviction before a justice for the same offense, may introduce a transcript of the justice's record showing the defendant's conviction of the offense, though the transcript do not state that some person, present at the commission of the offense, was examined as a witness, &c. But whether the transcript is sufficient, *prima facie*, to sustain the defense, *quære*.—*Goudy v. The State*.....548
2. The facts relative to the evidence given at the trial before the justice, may, in such case be proved by parol.....*Ibid.*

FORMER RECOVERY.

See TROVER, 9.

FRAUD.

See BOND, SINGLE, 2. CHANCERY, 3, 5, 9, 14, 16. FRAUDS, STATUTE OF. FRAUDULENT CONVEYANCE. LIMITATIONS, STATUTE OF, 2. MORTGAGE, 2, 3, 4, 14. ONUS PROBANDI. PLEADING, 4. RIGHT OF PROPERTY, TRIAL OF, 3. SALE OF GOODS, 2.

FRAUDS, STATUTE OF.

See SALE OF GOODS, 3, 5. TRUST, 3. USURY, 2. VENDOR AND PURCHASER, 9.

1. Payment of the purchase-money of real estate is not, of itself, a sufficient part-performance to take a case out of the statute of frauds.—*Johnston v. Glancey et al*.....94

2. The purchaser's entering into possession of the estate in pursuance of the contract, is sufficient to take the case out of the statute..... *Ibid.*
3. But the mere continuance in possession of the premises, by a tenant after his purchase, is not sufficient for that purpose..... *Ibid.*
4. If a third person be induced to purchase the assignment of a note due from an intestate's estate, by the promise of the administrator that it shall be paid, the promise is not within the statute of frauds, and the administrator is personally liable to the assignee.—*Hackleman v. Miller et al.*.....322

FRAUDULENT CONVEYANCE.

1. Bill in chancery to set aside a conveyance of real estate, executed to A by the other defendants. The bill stated that the grantors, at the time the deed was executed, were indebted to the complainants in a certain sum of money, of which the grantee had notice; that the conveyance was without consideration, and was made by the grantors and received by the grantee for the purpose of defrauding the complainants out of their demands. It was also stated that the complainants afterwards obtained judgments for the debts before a justice of the peace; took out executions thereon which were returned *nulla bona*; and filed transcripts of the judgments in the clerk's office of the Circuit Court. The answers denied all fraud; but the allegations of the bill, in the opinion of the court, were sustained by the depositions. *The court* set aside the conveyance as fraudulent and void as to creditors.—*Ewing et al. v. Harris et al.*.....71
2. If a conveyance of real estate, executed by an intestate in his life-time to defraud his creditors, be set aside after his death by a court of chancery in a suit by the creditors, and the land be sold under the decree in order to pay the debts, neither the administrator of the estate, nor the Probate Court, has any control over the proceeds of the sale.—*The Bank of the U. S. et al. v. Burke et al.*.....141
3. The creditor whose bill is first filed to set aside such fraudulent conveyance, executed previously to any judgment against the intestate, is

entitled to a priority of payment over the other creditors..... *Ibid.*

FRAUDULENT MORTGAGE.

See MORTGAGE, 2, 3, 4.

G

GAMING.

1. Whether the circumstance of the defendant's permitting a roulette to be gambled upon once in his house is sufficient evidence to support an indictment against him for keeping a room for gambling, is a proper question for the jury.—*Armstrong v. The State.*.....247
2. The jury to whom such a cause is submitted may determine the law as well as the facts..... *Ibid.*

GAOL.

See PRISON LIMITS.

GARNISHEE.

See CHANCERY, 3.

GENERAL ISSUE.

- See BOND, SINGLE, 3. JURISDICTION, 3. JUSTICE OF THE PEACE, 4, 7, 17. PARTNERS. PLEADING, 13, 14, 20. PROMISSORY NOTES, 16, 19. R. PLEVIN, 7. SLANDER, 9. TRESPASS 9, 10, 11, 18, 19.

GOODS, MORTGAGE OF.

See MORTGAGE, 2, 3, 4, 10, 11.

GOODS, SALE OF.

See SALE OF GOODS.

GOODS SOLD AND DELIVERED

See PLEADING, 1, 4.

GRAND JURY.

See PERJURY, 2.

GUARDIAN AND WARD.

See INFANT.

H

HEIRS.

See LAND OFFICE CERTIFICATE MORTGAGE, 8, 9. PARTIES, 2.

The heir is not bound, in any case, for the debts of his ancestor, beyond the amount of the assets descended. *Bryan v. Byrthe et al.*.....249

HUSBAND AND WIFE.

See DIVORCE. JUSTICE OF THE PEACE,
9. SLANDER, 1.

If, in a suit brought by the State, on the relation of a *feme sole*, the relator's subsequent marriage be suggested and the plaintiff recover, the judgment should be for the State, on the relation of the husband and wife.—*Trimble et al. v. The State*....42

I

ILLEGITIMACY.

See BASTARDY.

INDENTURE.

See INFANT, 3, 4. OVERSEERS OF THE POOR.

INDIANAPOLIS.

1. The statute of 1831, entitled "An act to authorize the Agent of State for the town of *Indianapolis*, to lay off the lands belonging to the State into lots and offer the same for sale," is a public act; and it is therefore no objection to the admission, as evidence, of the plat of that town, executed, &c., as the said act prescribes, that the act is not pleaded.—*West et al. v. Blake*.....234
2. The above-named statute, by causing a survey, &c., of the town of *Indianapolis* to be made, and declaring the map of the same to be a public record, constitutes, of itself, the streets and alleys in the town public highways.....*Ibid.*

INDIANS.

See INDICTMENT, 1. WITNESS, 7.

INDICTMENT.

See ABATEMENT, 3. ARREST OF JUDGMENT. CORPSE, DISINTERMENT OF, 2. JURY, 2. KIDNAPPING. PERJURY, 3. RECORD, 3. VARIANCE, 1, 2.

1. An indictment against a person for selling spirituous liquors to an Indian, can not be objected to merely because the name of the Indian is not inserted, if the indictment state that the name is unknown to the jurors.—*The State v. Jackson*.....49
2. In an indictment, a count charging a robbery from A may be joined with a count charging an assault and battery with intent to rob A.—*McGregg v. The State*.....101

3. If an indictment for a felony contain several counts, and it be proved to be the design of the prosecuting attorney to convict the defendant of separate felonies, the Court will compel him to elect upon which count he will rely. But the mere circumstance of there being several counts is not, of itself, sufficient to require such an election to be made.

Ibid.

4. An indictment against a constable, under the 48th section of the act relative to crimes and punishments, R. C. 1831, p. 190, for official negligence in not executing a State's warrant, need not contain an averment that the justice who issued the warrant had legal authority to do so; nor an allegation, that previously to the issuing of the warrant, a complaint on oath was made to the justice charging the person to be arrested with the commission of a crime; nor that a crime was committed in the view of the justice.—*Stewart v. The State*.....171
5. It is sufficient if the indictment, in such case, set out a warrant legal upon its face.....*Ibid.*
6. The State is a "person," within the meaning of the above-named section of the statute; and an averment, therefore, that the offense was to the injury of the State, was sufficient.....*Ibid.*
7. An indictment charging a person who has taken up an estray, with not complying with the provisions of the statute on the subject, must state the particular acts which the defendant has omitted to perform.—*Dixon v. The State*.....312
8. An indictment concluding "against the peace of the State," may be so amended by the prosecuting attorney, with leave of the court, as to read "against the peace and dignity of the State."—*Cain v. The State*.....512

INDORSEMENT.

See ASSIGNMENT.

INFANT.

See CHANCERY, 6. EXECUTORS AND ADMINISTRATORS, 4, 11, 12, 14.

1. An infant may sue by guardian.—*Rucker v. McNeely*.....179
2. An infant has a right to consider any person as his guardian, bailiff, or trustee, who enters upon his land and receives the proceeds, and may

- compel him to account for the same in a court of chancery.—*Grimes et al. v. Wilson et ux.*.....331
3. An indenture of apprenticeship executed by a minor is not binding on him at common law; nor is it binding on him under the statute of this State, unless sanctioned by a parent or guardian.—*Harney v. Owen*....337
4. If a minor, on the ground of his infancy, rescind a contract which had been fairly executed, and which was apparently to his advantage, he can not afterwards sue for the money or property advanced, or labour performed, by him under such contract.....*Ibid.*
5. An inquiry of damages cures all defects that are cured by a verdict. *Ibid.*

INSANITY.

See SLANDER, 9.

INSOLVENT DEBTORS.

See CHANCERY, 10.

An insolvent debtor, imprisoned on an execution issued by a justice of the peace, must make his application for relief from imprisonment to two justices of the peace.—*Hutchen et al v. Niblo*.....148

INSTRUCTIONS TO JURY.

See NEW TRIAL, 6, 7. PRACTICE, ..

INQUEST.

See AD QUOD DAMNUM.

INQUIRY, WRIT OF.

1. Upon the execution of a writ of inquiry after a judgment by default, in a suit on a promissory note, the execution of the note can not be disputed; but the jury must be satisfied that the note produced is the same with that described in the declaration.—*Runnion et al. v. Crane et al.*.....466
2. The jury of inquiry in such case is not obliged to disregard the note, because an erasure or alteration, which is unexplained, appears upon its face.....*Ibid.*
3. After judgment for the plaintiff on demurrer to the declaration, in a suit on a promissory note, it is unnecessary, on executing the writ of inquiry, to prove the execution of the note.—*The State Bank of Indiana v. Brooks*485
4. Assumpsit; judgment against the defendant by default; damages assessed at \$220.75; and final judgment accordingly. The writ describes the plaintiff as administrator *de bonis non* of A, and states the damages at more than were assessed. The declaration describes the plaintiff as administrator of A, and states the demand to be \$300 due the intestate; concluding to the plaintiff's damage — hundred dollars. *Held*, that the judgment was not erroneous; the variance between the writ and declaration, and the omission in the conclusion of the declaration of the amount of damages, being cured by the statute of *joefails*.—*Peltier v. Britton*.....502

1. The Court ought not to express to the jury any opinion respecting the sufficiency of the evidence.—*Hackleman et al. v. Moat*.....164
2. If an instruction to the jury be refused, and the record do not show its applicability to the case, it must be presumed to have been irrelevant and correctly refused.—*Linville v. Earlywine*.....469

INTEREST.

See EXECUTORS AND ADMINISTRATORS, 15. PRINCIPAL AND AGENT, 1. USURY.

1. The statute gives interest for money had and received, where the money is retained without the owner's knowledge, or where it is retained after it has been demanded. But interest is not recoverable, in other cases, on a count for money had and received.—*Hawkins v. Johnson*.....21
2. A plaintiff obtained a judgment before a justice on a note dated the 12th of January, 1833, bearing interest at a higher rate than *six per cent. per annum*. The defendant appealed to the Circuit Court. *Held*, that upon the plaintiff's recovery in the Circuit Court, he was entitled to interest up to the time of such recovery at the rate mentioned in the note.—*Bates v. Wernwag*.....272

INTESTATE'S EFFECTS.

See LEX LOCI, 1.

ISSUE.

See EVIDENCE, 1, 17.

JEOFAILS, STATUTE OF.

See ARBITRATION, 1. INQUIRY, WRIT OF, 4, 5. VERDICT, 1.

JOINDER OF COUNTS.

See INDICTMENT, 2.

JOINDER OF PARTIES.

See CHANCERY, 6.

JOINT ACTION.

In a joint action against two, on a joint, or on a joint and several contract, the plaintiff can not take judgment against one alone, unless the process be returned *non est inventus* as to the other.—*Gibbons v. Surber*.....155

JOINT AND SEVERAL.

See JOINT ACTION. SCIRE FACIAS, 1.

A took a lease of real estate, covenanting to pay rent, &c. Several weeks afterwards, B agreed with the lessor by a writing obligatory to be surety for the lessee. *Held*, that the contracts of A and B were several, and did not subject them to a joint suit. *Tourtellott et al. v. Junkin et al*....483

JUDGMENT.

See ARBITRATION, 4. BASTARDY, 4, 5, 6, 8, 12, 13. CONSIDERATION, 4. EVIDENCE, 11, 23. EXECUTORS AND ADMINISTRATORS, 13. FORMER ACQUITTAL. FORMER CONVICTION. HUSBAND AND WIFE. JOINT ACTION. JUSTICE OF THE PEACE, 10, 11, 20. NEW TRIAL, 5. SET-OFF, 4.

A judgment which is unreversed can not be objected to as evidence, merely because it is erroneous. *Aliter*, if it be a nullity.—*Doe d. Wilkins v. Rue et al*.....263

JUDGMENT BY DEFAULT.

See DEFAULT, JUDGMENT BY.

JURISDICTION.

See CHANCERY, 3, 5, 7 to 16. DIVORCE, 2. DOCKET-FEE, 2. EXECUTORS AND ADMINISTRATORS, 5. FORMER ACQUITTAL, 1, 2. FRAUDULENT CONVEYANCE, 2. JUSTICE OF THE PEACE, 7, 10, 11, 15, 16, 17, 20, 24. PERJURY, 1. PROBATE COURT. REPLEVIN, 6.

1. A plea to the jurisdiction of a justice in assumpsit was not sworn

to; but the plaintiff went to trial on it before the justice and on appeal in the Circuit Court, without mentioning the defect. *Held*, that the objection was waived.—*M' Cormick v. Maxwell*.....168

2. The process in such case need not be answered, if not issued in the township where the defendant lives, or where the cause of action accrued, or where the process was served, unless there be no competent justice in such township...*Ibid*.

3. The want of jurisdiction, in such case, may be proved under the general issue.....*Ibid*

4. If a Court, either of law or of chancery, have no jurisdiction of the *subject-matter* in controversy, it can render no valid judgment or decree upon the merits of the cause.—*Bryan v. Blythe et al*.....249

5. Whether the declaration shows a sum due, sufficiently large to give the Circuit Court jurisdiction, depends, not upon the amount of any one particular item, but upon the whole amount demanded in the declaration.—*State Bank of Indiana v. Brooks*.....485

JURY.

See CHALLENGE. GAMING. TRIAL.

1. The jury are the exclusive judges of the credibility of witnesses.—*De Camp et al. v. Stevens*.....24

2. In an indictment for larceny, the jury have a right to determine the law as well as the facts of the case.—*Warren v. The State*.....150

3. In the course of drawing the names of the jurors from the box for the Circuit Court, it was discovered that some of the persons whose names had been drawn, were not freeholders nor householders. The names of such unqualified persons were then rejected, the other names which had been drawn, were again put into the box, and in the place of the rejected names, others were also put into the box. *Held*, that this proceeding was not objectionable.—*Lindley et al. v. Kindall*...189

4. There were two issues of fact, and the jury were sworn to try the *issue*. *Held*, that it was too late for the defendant, after verdict and judgment against him, to object to the informality of the oath to the jury. *Ibid*.

5. In criminal cases, except petit misdemeanors, &c., the State as well as the defendant may insist on a trial by jury.—*The State v. Mead*.....309
6. If the State claim a jury in such criminal case, but the Court notwithstanding try the cause without a jury and acquit the defendant, the trial is a *nullity*, and the cause must be tried again.....*Ibid.*
7. After a trial in a civil suit had commenced, the jury were permitted, by consent of parties, to disperse until the next day. One of the jurors failing to appear on the next day the jury were discharged and another immediately impaneled. *Held*, that this proceeding was not erroneous.—*Harris v. Doe d. Barnett et al*369

JUSTICE OF THE PEACE.

- See APPEAL, 2 to 12. BASTARDY, 1, 2, 5, 8, 11. DISTRESS. EVIDENCE, 4, 23. FORMER ACQUITTAL, 1, 2. JURISDICTION, 1, 2, 3. REPLEVIN, 4, 5, 6. TRESPASS, 2, 11, 12, 20.
1. Judgment for the plaintiff in a suit before a justice of the peace. Appeal to the Circuit Court by the defendant. The Circuit Court dismissed the suit; and on a writ of error, the judgment of dismissal was affirmed. The reason given for the affirmance was, that it did not appear from the transcript of the record, that the plaintiff below had filed any statement of his demand, or any note or other writing relied on as the cause of action.—*Bell v. Trotter*.....12
 2. A judgment of the Circuit Court for the plaintiff, on an appeal from the judgment of a justice of the peace, must be reversed, if the transcript of the record do not disclose the cause of action. But any statement, however short or informal it may be, will answer the purpose, provided enough be shown to bar another action for the same demand.—*Denby v. Hart*.....13
 3. A person being commissioned a justice of the peace, executed a bond with surety to the Governor, conditioned for the faithful discharge of his official duties, and for the payment, to the persons entitled, of all moneys that should come into his hands by virtue of his office. At the time the bond was executed, there was no statute in force authorizing the execution of such a bond by a justice of the peace. *Held*, that the bond was not warranted by law, and that no suit could be sustained on it.—*Silver et al. v. The Governor*.....15
 4. The plaintiff in a justice's Court has the benefit of the general issue though it be not pleaded, and though a special plea be filed.—*McHutton v. Baues et al*.....63
 5. In a declaration against a justice of the peace and his sureties, on the official bond of the justice, it is not a sufficient assignment of a breach to state generally, that the justice had not faithfully discharged his duty; but the breach of some particular duty, of which breach the relator has a right to complain, must be set out.—*The State v. Littlefield et al*.....129
 6. The sureties in such case are not liable, unless the act complained of was done corruptly, or with a knowledge that it was unlawful.....*Ibid.*
 7. The defendant in a justice's Court may show, under the general issue, that the process had not issued in the proper township.—*Thomas v. Winters*.....161
 8. In a suit before a justice of the peace, a bond with condition, which appears upon its face to have been executed between the parties to the suit, may be filed as the cause of action, without an assignment of breaches.—*Vandagriff v. Tate et ux.* 174
 9. But a note payable to a woman, who is one of the two plaintiffs in a suit, is not a sufficient statement of the cause of action, without an averment of her marriage with her co-plaintiff.....*Ibid.*
 10. *Held*, that the record of a judgment by confession, rendered by a justice of the peace in 1833, should show that an oath relative to the fairness of the proceedings, as prescribed by the statute of 1831, was taken by the defendant, or the judgment is of no validity.—*Ex parte Knight*220
 11. Previously to the entry by a justice of a judgment by confession, the judgment-debtor must take an oath respecting the fairness of the judgment as is prescribed by the statute; and the oath must be filed and entered of record by the justice.—*Munn v. Perkins*.....271

12. A justice of the peace rendered a judgment for *A*, the plaintiff, and the defendant *B* appealed. The justice failed to transmit the papers in time to the clerk's office, and the appeal was dismissed. *B* sued the justice for this neglect. *Held*, that the declaration, in such case, should state that *B* had a good defense to the whole or a part of *A*'s demand.—*Crews v. Sheets*.....275
13. In case of a breach, by a justice of the peace, of the condition of his official bond, his death does not discharge the responsibility of his sureties.—*The State v. Houston et al.*..291
14. If the justice were, in such case, the sole obligor, or the surviving obligor, the action would survive against his executors or administrators.....*Ibid.*
15. A justice of the peace has no authority to try titles to real estate.—*Maxam et al. v. Wood*.....297
16. The statement of demand filed before a justice, need not show that the justice has jurisdiction of the suit; but if such statement show the justice's want of jurisdiction, the suit will be dismissed.—*Perkins v. Smith*.....299
17. The want of jurisdiction of the justice may be pleaded, or given in evidence under the general issue. *Ibid.*
18. In a suit commenced before a justice of the peace, by the assignee against the assignor of a promissory note, the plaintiff need only file, as a cause of action, the note with the assignment.—*Watson v. New*.....313
19. A justice of the peace with whom the docket of a former justice is legally deposited, may give certified copies from such docket; but the certificate must show that the justice making it has the legal custody of the docket.—*Anderson et al. v. Miller*.....417
20. A judgment of a justice against a defendant is a nullity, unless the defendant had actual or constructive notice of the suit, or appeared to it.....*Ibid.*
21. In a justice's court, an article of agreement between the parties, containing conditions precedent to be performed by the plaintiff, may be filed as the cause of action, without an averment of performance of the conditions.—*Wiley v. Shank et al.*..420
22. The circumstance, that on a trial

of a cause before *A B*, a justice, without a jury, the justice was, with consent of parties, assisted by *C D*, another justice, who sat and consulted with him on the trial, is no objection to the judgment pronounced in the cause by *A B*.—*Dougherty v. Mason*.....432

23. A justice having rendered a judgment for the plaintiff, was directed by him not to issue an execution until the time for taking an appeal had expired. *Held*, that in such case, the justice was not bound to issue an execution until the plaintiff requested it.—*Tingle v. Pulliam*..442
24. A justice of the peace has no jurisdiction in an action of debt, or on the case, against a constable for an escape, if the demand exceed fifty dollars.—*Forsha v. Watkins*.....520

JUSTIFICATION.

See PLEADING, 19. TRESPASS, 9, 12
13, 14. WABASH AND ERIE CANAL, 3.

K

KIDNAPPING.

If the description of the offense, in an indictment for kidnapping, agree with the language of the statute, it is sufficient.—*The State v. McRoberts*.....178

L

LADING, BILL OF.

See CARRIERS, 1. EVIDENCE, 9, 10.
SALE OF GOODS, 4.

LANDLORD AND TENANT.

See DISTRESS.

LAND OFFICE CERTIFICATE.

1. A land office certificate issued in favor of the heirs of *A* can not be assigned by the administrator of *A*.—*Hawkins v. Johnson*.....21
2. If such an assignment be made, the consideration paid for it may be recovered back in an action for money had and received.....*Ibid.*
3. The amount paid for the assignment is to be ascertained, in the absence of other testimony, by the price of public land at the time of the assignment*Ibid.*
4. If a person entitled to a land certificate under the act of Congress of

the 23d of *May*, 1828, die, the certificate issues to his heirs. Whether, when the certificate has so issued and there is a deficiency of assets, the executor or administrator can require the certificate or its value from the heirs? *Quære*.—*Shanks v. Lucas*.....476

LARCENY.

See ARREST OF JUDGMENT. JURY, 2.
SLANDER, 3, 13.

LAW BOOKS.

See PRACTICE, 4.

LEASE.

See SCHOOL LANDS.

LEX LOCI.

1. The distribution of the personal property of an intestate, wherever it may be situated, is governed by the laws of the country of his domicile at the time of his death.—*Irving v. McLean et al*.....52
2. If a bond is void by the laws of the State where it was made, and where the court must presume, (no other place being named), it was to be performed, it can not be enforced in this State.—*Titus v. Scantling et ux*.....89

LICENSE.

See MERCHANDISE, FOREIGN. PRISON LIMITS, 6.

LIEN.

See EXECUTION, 3. SALE OF GOODS, 5.

1. The vendor of real estate retains an equitable lien on the property for the purchase-money, (unless he voluntarily divest himself of it), against the vendee, and subsequent purchasers with notice.—*Deibler et al. v. Barwick*.....339
2. An agent for the sale of certain real estate sold the same to *N.*, and fraudulently took a note in his own name for the purchase-money. The payee assigned the note to *S.*, and the assignee sued the maker. The maker pleaded infancy and thus defeated the suit. The administrator of *S.* filed a bill in chancery against the original owner of the estate, the agent, and the maker of the note, stating the above facts, averring the insolvency of the assignor, and praying a sale of the estate to satisfy the

note. *Held*, that there was no equity in the bill.....*Ibid*

LIMITATIONS, STATUTE OF.

See SLANDER, 1.

1. Technical and continuing trusts, not cognizable at law, are not barred by the statute of limitations —*Raymond et al. v. Simonson*.....77
2. In cases of fraud, the statute of limitations does not begin to run until the fraud is discovered*Ibid*.
3. When a request is essential to the maintenance of a suit for the non-performance of a promise or duty, the statute of limitations does not begin to run until the request has been made.....*Ibid*.
4. The administrator of a guardian was sued in chancery by the administrator of a ward, for money received by the guardian from the administrator of the ward's father, as part of the ward's distributive share of his father's estate; and it appeared that the guardian had given receipts for the money thus received. *Held*, that the demand was not barred by the statute of limitations..*Ibid*.

LOST WRITINGS.

See EVIDENCE, 8, 20.

M

MARRIAGE.

See HUSBAND AND WIFE.

1. In an action for crim. con., it was held that the solemnization of the plaintiff's marriage might be proved by a witness, who was present at the ceremony —*Nixon v. Brown*.....157
2. Whether, if the marriage was solemnized in another State by a justice of the peace, it should be proved that, by the laws of such State, a justice was authorized to perform the ceremony?—*Quære*.....*Ibid*.

MAYHEM.

Son assault is a good defense to an indictment for *mayhem*; but the defense can only be sustained by proof, that the resistance was in proportion to the injury offered.—*Hayden v. The State*.....546

MEASURE OF DAMAGES.

See CARRIERS, 3. PRISON LIMITS, 4.

MERCHANDISE, FOREIGN.

The statute imposing a fine upon any person who shall, without having a license as required by law, vend any foreign merchandise within this State, is not in violation of the constitution of the *United States*.—*Beall v. The State*.....107

MESNE PROFITS.

See CHANCERY, 15.

MESSUAGE.

See DOWER.

MINOR.

See INFANT.

MISTAKE.

See CHANCERY, 9, 14, 16.

MIS-TRIAL.

See JURY, 6.

MONEY HAD AND RECEIVED.

See CHANCERY, 13. INTEREST, 1. LAND OFFICE CERTIFICATE, 2. PROMISSORY NOTES, 11. VENDOR AND PURCHASER, 5.

1. To sustain a count for money had and received, it must appear that the defendant had received *money* due to the plaintiff, or something which he had really or presumptively converted into money before suit brought, or which he had received as money and instead of it.—*Hatten v. Robinson*.....479

2. A promissory note is not evidence, on a count for money had and received, against one of the makers who is only a surety for the other.

Ibid.

3. A count for money had and received is not maintainable, if the contract on which the money was received has been in part performed, and the plaintiff has derived some benefit, unless the parties can be placed by a recovery in the same situation in which they were before the contract.—*Peters v. Gooch*....515

MORTGAGE.

See VENDOR AND PURCHASER, 1.

1. Debt on a promissory note. Plea, that the defendant had executed a mortgage on real estate to secure the debt; that the plaintiffs had obtained a decree of foreclosure and sale of

the mortgaged premises; that a writ of error to the decree had been sued out by the defendant, and the cause was then pending in the Supreme Court. *Held*, on demurrer, that the plea was bad.—*Brown et al. v. Wernwag*.....1

2. An execution was levied on certain goods found in the possession of the execution-debtor. A third person claimed the goods under a mortgage, which had been previously executed to him in good faith by the execution-debtor, to secure the payment by a given time of a just debt. Nothing was said in the mortgage as to which of the parties should have possession of the goods. At the time the mortgage was executed, the goods were delivered to the mortgagee and were left by him with the execution-debtor, in whose possession they remained until the time of the levy. *Held*, on a trial of the right of property, that the mortgagor's possession of the goods was not conclusive evidence of fraud as to creditors; but that his possession might be explained by parol evidence, and shown to be fair and consistent with the contract.—*Watson et al. v. Williams et al.*.....26

3. Whether goods mortgaged to secure a debt, but which are suffered to remain with the mortgagor after the time limited for payment, and are used by him as his own, can be taken on the execution of a third person against the mortgagor, depends on the question whether the mortgage was executed to defraud the mortgagor's creditors, which is a question for the determination of a jury.—*Hankins et al. v. Ingols*...35

4. The possession and use of the goods in such case, are *prima facie* evidence of fraud; but the presumption of fraud thus raised may be rebutted by testimony showing the transaction to be *bona fide*.....*Ibid.*

5. A bill was filed to redeem certain premises which the complainant had caused to be absolutely conveyed to the defendant. The bill averred that the deed was intended to be only a mortgage; but this averment was expressly denied by the answer. *Held*, that though the complainant might introduce parol testimony to show that a mortgage was intended, yet that the testimony must be very clear and decisive to enable him to

succeed. *Held*, also, that evidence of the grantee's confessions, in such case, should be received with great caution.—*Conwell et al. v. Evill*....67

6. Proof, in such case, that the property had cost the complainant about three times as much as he received for it from the defendant, and that the complainant had continued in possession for two years after the execution of the deed, was held not to be sufficient to warrant a presumption that the sale was not absolute, against the face of the deed and the defendant's answer.....*Ibid*.

7. A bill in chancery for a foreclosure, &c., stated that the mortgagee had, for value received, assigned and indorsed to the complainant the note to secure which the mortgage was executed, and ordered the payment to be made to him. *Held*, that the description of the assignment was sufficient in equity.—*Slaughter v. Foust et al*.....379

8. The heir, and not the executor or administrator, of a deceased mortgagor, is the proper party defendant to a bill for a foreclosure and sale of the mortgaged premises.....*Ibid*.

9. The statute which prohibits the commencement of a suit against an executor or administrator, until the expiration of a year from the date of his appointment, does not apply to a bill for a foreclosure, &c., against the heir of the mortgagor.
Ibid.

10. The mortgagee of goods (the mortgage being silent on the subject) is entitled to their immediate possession.—*Case v. Winship*.....425

11. Parol evidence is not admissible to show that it was the understanding of the parties to such mortgage, at the time of its execution, that the mortgagor should retain possession of the goods until forfeiture....*Ibid*.

12. If a debtor execute to his creditor an absolute deed of conveyance for real estate, with a verbal condition that the grantor shall have the right, for a specified time, to redeem by payment of the debt, the deed is but a security for the debt.—*Blair v. Bass*.....539

13. The assignment of a debt so secured carries the security with it.
Ibid.

14. The debtor in such case may waive the right to redeem, and authorize the creditor to sell the land in order

to obtain payment; and in case of a sale, though the debtor's design in authorizing it be to defraud other creditors, a *bona fide* purchaser for value will be protected by a court of equity.....*Ibid*.

MORTGAGE OF GOODS.

See MORTGAGE, 2, 3, 4, 10, 11.

MULTIFARIOUSNESS.

See CHANCERY, 4.

N

NE EXEAT.

1. To debt on a bond executed upon the issuing of a writ of *ne exeat*, plea that the defendant had paid the costs and that the writ had issued upon good cause, is a bar to the suit.—*Coombs v. Newlon et al*....124
2. In an action on such a bond, *non damnificatus* is not a good plea.
Ibid.

NEW ALBANY.

The president and trustees of *New Albany* were not authorized, by the act of incorporation of 1832, to extend the limits of the corporation so as to include the out-lots of the town, without the consent of a majority of the resident owners of such lots.—*Hale v. Woodruff*.....184

NEW TRIAL.

See APPEAL, 9.

1. A bill in chancery was filed to obtain a new trial of a suit at law. The bill relied on the absence of a material witness for the complainant at the time of the trial, whose place of residence was then unknown; but it did not state that any diligence had been used before the trial to find the witness, or to procure his testimony; and it appeared that the suit at law was not brought until several years after the cause of action had accrued. *Held*, that the bill should be dismissed.—*Doubleday et al. v. Makepeace*.....9
2. *Trover*. Plea, not guilty; and verdict in favour of the plaintiff for thirty-three dollars. New trial granted on the plaintiff's motion. On the second trial, verdict and judgment in favour of the plaintiff for \$1,750. *Held*, that this court must presume, the record not show-

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- ing the contrary, that there was sufficient ground for the new trial.—*Jones v. Jones*.....140
3. It is a general rule that a plaintiff, after a verdict against him, can not claim a new trial on account of his having been surprised by the defendant's evidence.—*Cummins et al. v. Walden*.....307
4. On a motion for a new trial, on the ground that certain facts can be proved by a witness who is absent, the affidavit of the witness himself should be produced or its absence accounted for.....*Ibid.*
5. If the court try a cause by consent, without a jury, the judgment takes the place of a verdict, and can be set aside only on the same preponderance of evidence that would invalidate a verdict.—*Priest v. Martin*311
6. A verdict in accordance with the weight of the testimony and with justice, ought not to be set aside on account of an erroneous instruction given by the court to the jury.—*Harris v. Doe d. Barnett et al.*.....369
7. The party against whom erroneous instructions to the jury are given, is entitled to a new trial without the payment of costs.—*Fisher v. Bridges*. 518

NIL DEBET.

See PLEADING, 13, 20.

NOLLE PROSEQUI.

See FORMER ACQUITTAL, 3.

1. *Quære*, whether the prosecuting attorney has a right to enter a *nolle prosequi* in a criminal cause after the trial has commenced; and if he has, what is the effect of such an entry upon another indictment for the same offense.—*The State v. Davis*. 345
2. The refusal, if wrong, to admit a *nolle prosequi* in such case, is no ground for a writ of error, after a verdict and judgment for the defendant.....*Ibid.*

NON DAMNIFICATUS.

See NE EXEAT, 2.

NOTARY PUBLIC.

The official acts of a notary public must be authenticated by his official seal, and not by a scrawl.—*Hinckley v. O'Farrel*.....185

NOTICE.

See ARBITRATION, 2. DEPOSITIONS, 2. TAXES. VENDOR AND PURCHASER, 2, 10, 11, 12, 18.

NOTICE TO QUIT.

See DISSEISIN.

NUL TIEL AWARD.

See ARBITRATION, 10.

O

OATH.

See ARBITRATION, 3. EVIDENCE, 20. JURY, 4. JUSTICE OF THE PEACE, 10, 11.

OCCUPYING CLAIMANT.

If the occupant of land evicted by a better title be entitled, under the occupying claimant law, to a compensation for his improvements, he is only liable for the rents and profits of the land without the improvements.—*Elliott et al. v. Armstrong*. 421

OFFICIAL BOND.

See JUSTICE OF THE PEACE, 3, 5, 6, 13, 14. PLEADING, 6. SHERIFF'S BOND.

OFFICIAL NEGLIGENCE.

See INDICTMENT, 4, 5, 6. JUSTICE OF THE PEACE, 12.

OHIO RIVER.

Where land is bounded by the *Ohio* river on the *Indiana* side, the owner's right extends to low-water mark.—*Stinson v. Butler et al.*.....285

ONUS PROBANDI.

If the plea to an action on a writing obligatory be that the obligation was obtained by fraud, the *onus probandi* lies on the defendant.—*Rogers v. Worth*.....186

OPINION.

See WITNESS, 6.

ORDER.

See BASTARDY, 12, 13. COUNTY, 2. COUNTY COMMISSIONERS, BOARD OF. EVIDENCE, 26.

A, holding a promissory note against B, gave C an order directed to B as follows: "Let C have as much of

my money in your hands as ne wants, and I will credit the note with the same." *Held*, that the order, being unrecalled, authorized *B*, by making payments to *C* from time to time, in cash or otherwise, to discharge the note.—*Early v. Patterson*.

449

OVERSEERS OF THE POOR.

1. The overseers of the poor are not authorized to bind out poor children as apprentices, unless their parents are dead or are unable to support them.—*Demar v. Simonson*.....132
2. If the indenture of the overseers show that it was executed in a case not warranted by the statute, it is void; and parol evidence is inadmissible in such case to show, that the indenture was executed on a different ground from that which the indenture itself describes.....*Ibid*.
3. Whether when the indenture does not state the ground upon which the overseers acted, parol evidence be not admissible to show that the case is within the statute?—*quere*...*Ibid*.

OYER.

See SCIRE FACIAS, 2. VARIANCE, 5, 6.

If in a suit on a specialty, the defendant obtain *oyer* of the instrument, and then set it out untruly in a material part and demur to the declaration—the court, on the plaintiff's motion, will set aside the demurrer, and render judgment in his favor for want of a plea, unless the defendant obtain leave to proceed more correctly.—*Rudisill v. Sill*.....282

P

PAROL EVIDENCE.

See CHANCERY, 16. DISTRESS, 2. EVIDENCE, 2, 4, 8, 10, 14, 19. FORMER CONVICTION, 2. MORTGAGE, 2 to 6, 11, 12. OVERSEERS OF THE POOR, 2, 3. RIGHT OF PROPERTY, TRIAL OF, 3. TRUST, 2, 3.

PARTIES.

See CHANCERY, 6. COMPANY, UNINCORPORATED. CONTRACT, 2. EXECUTORS AND ADMINISTRATORS, 19. JOINT AND SEVERAL. MORTGAGE, 8. PLEADING, 14. PROMISSORY NOTES, 18. SCIRE FACIAS, 1. WITNESS, 2.

1. A suit commenced before a justice

of the peace was entitled "*George Gose—James Jesse*, agent, v. *John Porter*," and a note executed by the defendant to *George Gose* alone was filed as the cause of action. *Held*, that *Gose* must be considered as the only plaintiff; and that the note was legal evidence in the suit.—*Gose v. Porter*.....187

2. A transcript of the judgment of a justice of the peace, with a certificate that an execution on the judgment had been returned "no property found," was filed in the clerk's office of the Circuit Court, for the purpose of obtaining an execution from that court. After the transcript was filed, and before the execution issued, the judgment-debtor died. *Held*, that in such case, the *scire facias* to have execution from the Circuit Court, should be not only against the heirs of the deceased, but also against his executors or administrators and the terre-tenants if any.—*Welborn et al. v. Jolly*.....279

PARTNERS

See COMPANY, UNINCORPORATED. EVIDENCE, 22. PLEADING, 3.

Suit by *Charles D. Dana*, *John D. Wheeler* and *Nicholas Merriweather*, on a promissory note payable to *Dana*, *Wheeler & Co*. The declaration described the plaintiffs as partners, trading under the firm of *Dana*, *Wheeler & Co*., and alleged that the note was made to them by the name of the firm. Plea, the general issue. *Held*, that the plaintiffs must prove that they constituted the firm.—*Fletcher v. Dana et al*.....377

PART PERFORMANCE.

See FRAUDS, STATUTE OF, 1, 2, 3. VENDOR AND PURCHASER, 9.

PATENT.

See EVIDENCE, 29.

PATENT RIGHT.

See PROMISSORY NOTES, 4 to 7.

1. The exclusive right of property in the invention of, or improvement on, any new and useful art, machine, &c., is the creature of statutory law, and must be strictly regulated by its provisions.—*Higgins v. Strong et al*.....182
2. The assignment of a patent right is not valid, unless the assignment be

recorded in the office of the Secretary of State of the *United States*; and a note given to an assignee for such a right, whose assignment had not been so recorded, is invalid for the want of consideration.....*Ibid.*

PERFORMANCE.

See COVENANTS. PROMISSORY NOTES, 11.

PERJURY.

See VARIANCE, 1.

1. If an affidavit be made under an act of Congress relative to the sale of public land, and the party in making it commit perjury, he may be punished under the act of Congress prohibiting the offense; but the courts of this State have no jurisdiction of the case.—*The State v. Adams*.....146
2. Perjury may be committed in giving evidence before a grand jury.—*The State v. Offutt*.....355
3. An indictment for perjury must state a day certain on which the offense was committed*Ibid.*

PLEADING.

See ABATEMENT. ANOTHER ACTION PENDING. APPEAL, 12. ARBITRATION, 1, 10. ATTACHMENT. BOND, SINGLE, 3. CHANCERY, 1, 4, 6, 15. COMPANY, UNINCORPORATED, 3. CONSIDERATION. CORPORATION, 2, 4, 6. CORYDON STEAM MILL COMPANY. ESTOPPEL. EXECUTORS AND ADMINISTRATORS, 19. FORMER ACQUITTAL, 2. JURISDICTION, 1, 3, 5. JUSTICE OF THE PEACE, 1, 2, 4 to 9, 12, 16, 17, 18, 21. MAYHEM. MORTGAGE, 1, 7. NE EXEAT. OYER. PRACTICE, 7, 8, 9, 12. PRISON LIMITS, 3, 5, 6. PROFERT. PROMISSORY NOTES, 2 to 7, 12, 16, 19. RELEASE. REPLEVIN, 3, 4, 5, 7. SCHOOL LANDS, 2, 3. SET-OFF. SHERIFF'S BOND, 1. SLANDER, 8, 9, 11. STATUTE, 1. TRESPASS, 1, 3 to 6, 8, 9, 12, 13, 14, 21. TROVER, 3, 4, 5, 9. VARIANCE, 5, 6, 7. VENDOR AND PURCHASER, 3, 14. VERDICT, 1. WABASH AND ERIE CANAL, 3. WARRANTY, 2, 3.

1. If a declaration for goods sold and delivered allege the goods to have been sold for a stipulated price, and then state a promise to pay the worth of the goods, alleging them to be worth the sum previously stated, it

is bad on special demurrer.—*Gist et al. v. Cicot*.....126

2. To an action on a bond, a plea stating merely that the parties had agreed, by a writing obligatory, that the bond should be discharged on certain conditions, is insufficient.—*Cammack v. Rupert et al.*.....153
3. Declaration in assumpsit by *Thomas Conley and George W. Hume*, trading under the firm of *Conley & Hume*, against *John Perkins*. 1st count—That the defendant and one *William S. Bussell*, on, &c., made their promissory note, &c., and thereby jointly and severally promised to pay the said *Conley & Hume* the sum of, &c. By reason whereof the defendant became liable, &c., and being so liable promised to pay, &c. 2d count—That the defendant, on, &c., made his other promissory note, and thereby promised to pay the said *Conley & Hume*, the plaintiffs, the sum of, &c. By reason, &c. Breach, that the defendant had not paid, &c. *Held*, on special demurrer, that the declaration was good.—*Perkins v. Conley et al.*.....187
4. In assumpsit for goods sold and delivered, a general plea of fraud is good even on special demurrer.—*Elliott v. Coggs*.....238
5. If in a suit on a judgment, the declaration set out the amount of the judgment correctly, the circumstance that the sum named in the *queritur* is less than the judgment, is not material.—*Harris v. The Muskingum M. Co.*.....267
6. Debt on a sheriff's bond against the principal and his sureties. Breach, the sheriff's failure to return an execution in favor of the relator, &c. Two pleas as follows: 1. That when the execution came to the sheriff's hands, the execution-defendant had no property within the sheriff's bailiwick whereof to make the money or any part of it, but was then and still continued to be notoriously insolvent. 2. That at the time when the execution came to the sheriff's hands, and at the time when it should have been returned, viz., on, &c., the relator had no interest in the execution or the judgment on which the same issued, nor was he entitled to any part of the money due thereon, &c. *Held*, that these pleas were bad on general demurrer. *Held*, also, that the declaration

- was bad; it containing no averment of a judgment on which the execution issued.—*The State v. Spencer et al.*.....310
7. The declaration in assumpsit stated, that the plaintiff had bought of the defendant all the fat hogs which the defendant then had, supposed to be about 530, at \$3.12½ per cwt., to be delivered, &c.; but that the hogs had not been delivered, &c. *Held*, that the declaration was bad on general demurrer, for not averring some particular number of hogs, with their weight, which the defendant had when the contract was made.—*McConnell v. Baker*.....325
8. *Held*, that a promissory note dated at Union county, State of Indiana, might be declared on in another county, without noticing the words State of Indiana.—*Reagan et al. v. Maze*.....344
9. *Held*, also, that the declaration in such case need not state the place at which the note is dated.....*Ibid.*
10. Pleadings must contain facts—not matters of law.—*Warner v. Hatfield*.
392
11. A plea professing to answer the whole declaration, but only answering a part, is bad on general demurrer.—*Griffith v. Fischli*.....427
12. In a suit by an administrator *de bonis non* against a debtor of the original intestate, the declaration must state the name of the previous administrator, and aver that the money had not been paid to him, nor to the original intestate, nor to the plaintiff.....*Ibid.*
13. To debt on bond, *nil debet* is a bad plea on general demurrer.—*Trimble et al. v. The State*.....435
14. The general issue admits the character in which the plaintiff sues.—*Linville v. Earlywine*.....469
15. As to the form of a declaration in an action on several bank notes.—*The State Bank of Indiana v. Brooks*.
485
6. If to a declaration in trespass containing several counts, a plea professing to answer the whole declaration only answer one of the counts, and do not aver the identity of the trespasses described in the different counts, it is bad on general demurrer. And such plea, though it contain the averment of identity is bad on special demurrer.—*Rubottom et al. v. McClure*.....505
17. Disseisin. Plea, 1. Not guilty; 2. A denial of the defendant's possession. *Held*, that the second plea amounted to the general issue, and might be rejected on motion.—*Rhoden v. Graham*.....517
18. In assumpsit by the assignee of a promissory note against the maker, the declaration set out the indorsement as follows: "And the said A (the payee) then and there, under his own proper hand, indorsed and delivered the said promissory note to the plaintiff. By means whereof," &c. Special demurrer to the declaration, because it does not state that the note was assigned by indorsement thereon under the hand of the payee. *Held*, that there was no ground for the demurrer.—*Marvin v. Slaughter*.....529
19. Trespass against a justice and constable for an assault and battery, &c. The justice pleaded, that he had entered three fines against the plaintiff for "profanely swearing three several oaths by taking the name of God in vain," and that the imprisonment, &c. The constable pleaded that as constable, under a mittimus in said case, &c., he did, &c. *Held*, that the description of the offenses in the pleas was sufficient.—*Odell et al. v. Garnett*.....549
20. When a deed—whether a single bill or a bond with a condition—is the foundation of an action of debt, *nil debet* is a bad plea on general demurrer.—*Love v. Kidwell et al.*....553
21. Assumpsit on a promissory note, dated the fourth of January, 1836, and payable one year after date. Pleas, 1. The general issue. 2. That the note was given for a part of the consideration of a tract of land, which the plaintiff was to convey to the defendant, free from incumbrances, on the day and year aforesaid, but which he had not so conveyed. 3. Similar to the second. 4. Similar to the second, except that it states that the land was to be conveyed in fee-simple, by a good and sufficient deed of conveyance with the usual covenant of general warranty, and that it had not been so conveyed. Replication to the second plea, admitting the consideration of the note as alleged, and stating that on the ninth of March, 1836, the plaintiff had fully complied with his agreement, by execut-

ing and delivering to the defendant a good and sufficient warranty deed for the land: *Held*, on general demurrer, that the third and fourth pleas and the replication to the second plea, were sufficient.—*Catlett v. McDowell* 556

POOR.

See OVERSEERS OF THE POOR.

POSSESSION.

See BOND, SINGLE, 4. EVIDENCE, 5. FRAUDS, STATUTE OF, 2, 3. MORTGAGE, 2, 3, 4, 10, 11. RIGHT OF PROPERTY, TRIAL OF, 3. TROVER, 1, 2, 8. VENDOR AND PURCHASER, 2, 5, 6, 9, 11.

PRACTICE.

See ABATEMENT, 1, 3, 6. APPEAL, 1, 3, 6, 7, 11, 12. ARBITRATION, 4, 15. BASTARDY, 4, 5, 10. CAPIAS AD RESPONDENDUM, 1. CHANCERY, 1, 2, 6, 12. CONTINUANCE. DEFAULT, JUDGMENT BY, 3. ERROR. EXHIBITS. INDICTMENT, 3. JOINT ACTION. JURY, 3, 7. OYER. PLEADING, 17. REPLEVIN, 3. SECURITY FOR COSTS. TAXES.

1. In debt on a bond conditioned for the performance of covenants, the breaches were assigned in the declaration, and a judgment by default was taken against the defendant. *Held*, that the breaches should be proved and the damages assessed, before the rendition of final judgment.—*Rany et al. v. The Governor*.....2

2 A judgment by default was set aside by consent of parties, on the condition that the defendant should, within twenty days, give sufficient bail to the sheriff, or that execution should issue on the judgment. *Held*, that this proceeding was incorrect.—*Freeman v. Hukill*.....9

3 That the plaintiff has failed to prove a material point in his case, is an objection not to be made until the examination of his testimony is closed. If it then appear, that any proof indispensable to the maintenance of the suit has not been produced, the court may instruct the jury that the plaintiff can not recover.—*Nixon v. Brown*.....157

4 If a passage in a law book of another country be not law in this State, it ought not to be read to the jury.....*Ibid.*

5. The order of time for the introduction of evidence to support the different parts of an action or defense, must be generally left to the discretion of the party introducing the evidence.—*Throgmorton v. Davis et ux*.....174

6. The statute requiring an oath to a plea, replication, &c., denying the execution of an instrument of writing, &c., does not dispense with the production of the instrument on the trial; it only excuses proof of the execution of the instrument, when such plea, &c., is without oath.—*Fosdick v. Starbuck*.....417

7. If upon a demurrer to a plea being overruled, the plaintiff withdraw the demurrer and reply, he can not afterwards object, on error, to the overruling of the demurrer.—*Early v. Patterson*.....449

8. Neither rules to plead nor rule-days are authorized by our statute.—*Runnion et al. v. Crane et al*...466

9. A party can not be required to perfect his pleading by a certain day in vacation; but a day during the term at which the cause is called, or during the subsequent term, may be set for that purpose.....*Ibid.*

10. A special demurrer can not be filed after the day for which the cause is set for trial.—*The State Bank of Indiana v. Brooks*.....485

11. Where there are several issues, they must be all disposed of before the plaintiff can have final judgment.—*Rubottom et al v. McClure*. 505

12. Declaration in slander containing two counts. Judgment by default, entire damages assessed by a jury, and final judgment accordingly. Errors assigned: 1. One of the counts is bad. 2. There is no sufficient venue in the declaration. *Held*, that the objections were made too late.—*Wickham v. Baker*.....517

PRECEDENT CONDITION.

See PROMISSORY NOTES, 11.

PRE-EMPTION, RIGHT OF.

A person having a pre-emption right to a certain tract of *United States'* land, which right was to expire on a certain day, sowed grain on the land which he knew would, on that day, be unripe, and then permitted the time to expire without making the purchase. *Held*, that a stranger,

who afterwards purchased the land of the *United States*, was entitled to the growing crop.—*Razor v. Qualls*. 286

PRESUMPTION.

See APPEAL, 1, 4. INSTRUCTIONS TO JURY, 2. MORTGAGE, 4, 6. NEW TRIAL, 2. TRESPASS, 11. WITNESS, 7.

PRINCIPAL AND AGENT.

See AGENT OF STATE. BOND, SINGLE, 2. EVIDENCE, 5. LIEN, 2. WITNESS, 11.

1. An agent is liable, by the statute, for interest on money received by him for his principal, from the time of its being demanded.—*Hackleman et al. v. Moat*.....164
2. Contracts with an agent acting in his principal's name, inure to the benefit of the principal.—*House v. Fort*.....293

PRINCIPAL AND SURETY.

See EVIDENCE, 6. JUSTICE OF THE PEACE, 5, 6, 13. SCIRE FACIAS, 3. SHERIFF'S BOND.

- A prolongation of the time of payment, given by a creditor to his debtor without a new contract founded on a valid consideration, though given without the consent of the surety of the debtor, will not exonerate the surety from his liability.—*Coman et al. v. The State*. 241

PRISON LIMITS.

1. If an execution debtor escape from the prison-bounds, the bond for the limits is forfeited; and his subsequent voluntary return to the bounds before the commencement of a suit on the bond, is no defense to such suit.—*Spader et al. v. Frost et al.* 190
2. Such a bond for the limits, though it should be insufficient under the statute, may still be good at common law.....*Ibid.*
3. Although the condition of such a bond do not contain a recital of the matters which led to its execution, and which show a connection between it and the obligee, the bond may still be sued on, and the omission be supplied by averments..*Ibid.*
4. In an action on such a bond, the measure of damages is the amount of the debt for which the debtor

was committed, together with interest and costs..... *Ibid.*

5. The replication in such a case, setting out the condition of the bond, &c., should aver the existence of a judgment on which the execution issued; and it should conclude with a verification.....*Ibid.*
6. It is a good plea to a suit on such a bond, that the execution-debtor left the bounds with the previous consent and license of the plaintiff..*Ibid.*

PROBATE COURT.

See EXECUTORS AND ADMINISTRATORS, 5, 6, 8, 9, 19. FRAUDULENT CONVEYANCE, 2.

The obligee of a title-bond died, and the obligor was appointed his administrator. The Probate Court directed the administrator to sell the land described in the bond for the payment of debts, receive the purchase-money, and make a title to the purchaser. The administrator accordingly sold the land, and gave the purchaser a bond conditioned for a conveyance when the purchase money should be paid. The administrator received the purchase-money and removed out of the State. The purchaser, without having demanded a deed, filed a bill in the Probate Court of the county against the administrator and infant heirs of the deceased, for a specific performance. *Held*, that the court had jurisdiction of the cause, and that the complainant was entitled to a decree.—*Boyle v. Moss*.....535

PROCESS.

See BASTARDY, 5. CAPIAS AD RESPONDENDUM. REPLEVIN, 2.

PROFERT.

Profert is not necessary in a declaration on a promissory note.—*Perkins v. Conley et al.*.....187

PROMISE.

See ASSUMPSIT. FRAUDS, STATUTE OF, 4. USURY, 2.

PROMISSORY NOTES.

See CHANCERY, 14. COMPANY, UNINCORPORATED, 3. CONSIDERATION, 2, 3. INQUIRY, WRIT OF, 1, 2, 3. INTEREST, 2. JUSTICE OF THE PEACE, 9, 18. MONEY HAD AND RECEIVED, 2. ORDER. PARTNERS.

PLEADINGS, 3, 8, 9, 18, 21. PRO-
FERT. SET-OFF, 2. USURY, 1.
WITNESS, 9, 10.

1. Suit by the assignee against the assignor of a promissory note. The plaintiff had obtained judgment against the maker, and sued out a *fiery facias*, which was returned *nulla bona*. Held, that as the plaintiff had held the note fourteen months after it became due, before he brought the suit, and gave no satisfactory reason for the delay, he had been guilty of gross negligence, and ought not to recover against the assignor.—*Treadway v. Drybread*.....20
2. A note for the payment of money, which has subjoined to it the payee's agreement to take goods, &c., can not be filed, instead of a declaration, as the cause of action.—*Taylor v. Meek*.....41
3. To debt on a promissory note, the defendant may plead in general terms, that the note was made without any good or valuable consideration whatever.—*Kernodle v. Hunt*..57
4. A plea in such case, that the note was made in consideration of the sale and conveyance to the defendant of the right to use, sell, &c., a certain patent right, which patent right was of no value, is insufficient. *Ibid.*
5. So, if the plea be that the note was executed in consideration of the sale and conveyance to the defendant of a right to use, sell, &c., a certain patent right, which the payee represented to be useful and valuable, but which was in fact of no use or value, it is not sufficient.....*Ibid.*
6. But a plea in such case, that the note was made in consideration of the sale and conveyance to the defendant of a right to use, sell, &c., a certain patent right, which the payee represented he owned and had authority to sell, when in fact he had no such ownership or authority, is a good defense to the suit.....*Ibid.*
7. A replication to the last-mentioned plea, that the note was executed for a good and valuable consideration, without fraud, &c., is not sufficient on special demurrer.....*Ibid.*
8. A promissory note, executed by *Ryland T. Brown* and *Alexander Gregg* and payable to *Joseph S. Burr*, was indorsed by the payee as follows: "Mr. Gregg: Pay the within

- to *Jesse Robinson*. (Signed) *Joseph S. Burr*." Held, that this indorsement did not transfer the legal ownership of the note to *Robinson*, and authorize him to maintain a suit on it against the makers or either of them, in his own name.—*Robinson v. Brown*.....128
9. The payee of a promissory note may sue on the original consideration for which the note was given.—*Hilligoss v. Bond*.....186
 10. If the payee of a promissory note refuse to comply with the condition upon which the note was made payable to him, he can not sustain a suit against the maker on the note. *Coppock v. Burkhart*.....220
 11. *A* and *B* entered into a written agreement, by which *A* was to purchase 1,500 hogs, and deliver them to *B* at a particular time and place, and at a specified price. The money necessary to buy the hogs was to be advanced by *B*. At the date of the contract, and in part-performance of it, *B* advanced to *A* \$300, and *A* gave to *B* a promissory note for the amount, as an evidence merely of the receipt of the money. In consequence of the fault of *B* in not afterwards advancing, according to his agreement, the residue of the money necessary for the purchase, *A* was prevented from complying with his part of the contract. Held, that a suit would not lie on the note for the want of consideration. Held, also, that *B* could not, under these circumstances, recover the money advanced to *A*, in an action for money had and received, nor sustain an action against him on the special contract.—*McKee v. Miller et al.*..222
 12. Suit on a note by the payee, who had previously promised to receive certain goods, on, &c., at his own house in payment.—Plea, that the goods were ready, on, &c., at the defendant's house, &c. Held, that the plea was bad.—*Taylor v. Meek*...388
 13. *A* owed *B* \$100, and gave his note with two sureties for the amount. Afterwards, in consideration of the forbearance of that debt and of the release of the sureties, *A* gave his note to *B* for the original debt and fifty dollars more, payable at a future time. Held, that the consideration for the whole of the latter note was valid.....*Ibid.*
 14. A note for a certain sum was pay-

able on the 27th of June, 1833. The payee promised in writing, at the bottom of the note, to receive a certain number of steers in payment, provided they should be delivered by the first of April, 1833. *Held*, that if the maker failed to deliver the steers by the said first of April, and to pay the note when due, the payee's remedy was an action of debt or assumpsit on the note for the non-payment of the money.

Ibid.

15. The assignee of a promissory note, given without consideration, may sue the assignor at any time, and without having previously sued the maker.—*Fosdick v. Starbuck*.....417
16. In a suit by the assignee against the maker of a promissory note, not payable and negotiable at a chartered bank, the defendant may prove, under the general issue, a want or failure of consideration.—*Tucker v. Tipton*.....529
17. The legal interest in a promissory note, though payable to bearer, is not transferable by delivery under the statute, unless the note be payable at some chartered bank within the State.—*McNitt v. Hatch*.....531
18. A suit on a promissory note must be brought in the name of the person who has the legal interest in the note.....*Ibid.*
19. The defendant may, under the general issue, defeat an action of assumpsit on a promissory note, by showing the want or failure of consideration, or he may reduce the damages by showing a partial failure of the consideration.—*Catlett v. McDowell*.....556

PURCHASER.

See VENDOR AND PURCHASER.

Q

QUERITUR.

See PLEADING, 5.

R

REAL ESTATE, SALE OF.

See VENDOR AND PURCHASER.

RECOGNIZANCE.

See BASTARDY, 1, 2, 10.

RECORD.

See DEFAULT, JUDGMENT BY, 1, 2
EVIDENCE, 11, 17, 23. EXECUTION
2. EXECUTORS AND ADMINISTRATORS, 9. JUSTICE OF THE PEACE
1, 2, 10, 11.

1. The record of a judgment by default against the defendant for want of an appearance, should show that the process had been served.—*Rany et al. v. The Governor*.....2
2. A bill of exceptions relative to the affidavit and bond in this case, stated: "which affidavit and bond are made a part of the record." *Held*, that this statement did not make the affidavit and bond a part of the record; and that to make them so by means of a bill of exceptions, they should be copied into the bill.—*Huff v. Gilbert*.....19
3. The record, in the case of an indictment, need not show that the indictment was signed by the prosecuting attorney, nor that there was a foreman of the grand jury.—*McGregg v. The State*.....101

RECORDER.

1. The statute authorizing the board of commissioners of any county in which the office of recorder becomes vacant by death, resignation, removal, or otherwise, to appoint some person to supply the vacancy until the next general election, is not unconstitutional.—*Hedley v. The Board of Commissioners, &c.*.....116
2. The board of county commissioners can not create a vacancy in the office of recorder, but when such vacancy has occurred, they may declare its existence, and make an appointment to supply it, in conformity with the statute.....*Ibid.*

REGISTRY.

See EVIDENCE, 27, 31.

RELATOR.

See HUSBAND AND WIFE.

RELEASE.

If the defendant in a court of error rely upon a release of errors, the release must be specially pleaded.—*Adams v. Beem et al.*.....128

RENT.

See DISTRESS.

RENTS AND PROFITS.

See CHANCERY, 5, 15. DOWER, 2. INFANT, 2. OCCUPYING CLAIMANT. SHERIFF'S SALE, 2.

REPLEVIN.

1. Replevin. Pleas, 1. That the defendant had not taken or detained the property. 2. Property in a stranger. 3. Property in the defendant. The plaintiff joined issue on the first plea, and replied to the second and third, property in himself. Verdict, "We find the property to be in the plaintiff." Judgment against the defendant for costs. *Held*, that this verdict did not authorize a judgment for the plaintiff, as the jury had not found that the horse had been taken or detained by the defendant.—*Huff v. Gilbert*. 19
2. In an action of replevin, the writ must contain a description of the goods for which the action is brought; but it need not show that the affidavit, required by the statute, had been made by the plaintiff.—*Magee v. Sigerson* 70
3. Replevin. Pleas, 1st, that the property of the goods was in *Solomon Perkins*; 2d, that the defendant was a constable, and as such had taken the property by virtue of an execution issued by a justice of the peace on a judgment against *Solomon Perkins*; and that the goods belonged to *Solomon Perkins*. *Held*, that the second plea might be rejected on the plaintiff's motion, it being the same in substance with the first.—*Mann v. Perkins* 271
4. If in replevin before a justice, the defendant appear, plead in bar, and go to trial, without objecting to the affidavit, he can not afterwards object to it as an affidavit. But the affidavit, in such case, may answer for the statement of demand; and in that character it may be objected to or be amended as other statements of demand.—*Perkins v. Smith*... 299
5. On an appeal in replevin, the plaintiff may, on payment of costs, have leave to amend his statement of demand filed before the justice, by inserting the value of the property. *Ibid.*
6. The justices' jurisdiction in replevin extends to goods the value of which does not exceed fifty dollars..... *Ibid.*

7. In replevin for the unlawful detainer of goods, *non cepit* is not a good plea; the general issue in such case is *non detinet*.—*Walpole v. Smith*. 304

8. To sustain replevin, the plaintiff must have a general or special property in the goods, and a right to their immediate possession..... *Ibid.*
9. A constable levied an execution on certain goods of the debtor, and delivered them for safe-keeping to the creditor. Before the return-day of the execution, and whilst the goods were so situated, the execution and levy were set aside. The constable, afterwards, demanded the goods of the creditor, who refused to deliver them. *Held*, that the constable, for the want of property in the goods, could not maintain replevin for them against the creditor..... *Ibid.*
10. Replevin for the detainer of a horse. Plea, property in defendant. Replication in denial, and issue. It appeared that the plaintiff had bought the horse of the defendant, but that the latter still had him in possession. *Held*, that these facts did not necessarily show that the issue must be found against the plaintiff, unless he had proved a demand and refusal of the horse.—*Litterel v. St. John*..... 326

REQUEST.

See DISSEISIN. LIMITATIONS, STATUTE OF, 3. PROBATE COURT. VENDOR AND PURCHASER, 19.

RESCINDING OF CONTRACT

See CONTRACT, 1. INFANT, 4.

REVENUE.

See TAXES.

REVIVOR.

See EXECUTORS AND ADMINISTRATORS, 16.

RIGHT OF PROPERTY, TRIAL OF.

See MORTGAGE, 2, 3, 4.

1. The claimant of goods, taken in execution against another person, filed a claim to the goods, stating them to be his and that his claim was just and legal, and then made an affidavit that the claim was true in substance and matter of fact. *Held*, that the affidavit was sufficient.—*Hankins et al. v. Ingols*..... 35

2. The execution-defendant, on a trial of the right of property between the claimant and the execution-plaintiff, is a competent witness for the claimant.....*Ibid.*
3. On a trial of the right of property taken in execution, the debtor's possession of the goods after his executing an absolute bill of sale of them to the claimant, may be shown, by parol evidence, not to be fraudulent.—*Foley et al. v. Knight*.....420
4. The affidavit and claim of a third person to property taken in execution, should show whether the claimant be the absolute owner, or whether his claim be conditional, and if the claim be conditional, whether it was created by deed or by parol; but if the objection for a defect in these particulars be not made before the justice, it is waived.—*Humble v. Williams*.....473

RIOT.

Indictment against three persons for a riot. Plea, not guilty. Verdict of guilty as to one, and of not guilty as to the others. *Held*, that upon this verdict a judgment could not be rendered against the defendant found guilty. *Aliter*, if the indictment had been against the defendants together with others whose names were not known.—*Turpin v. The State*72

ROADS.

A change in a part of the *Terre Haute* State road was made and marked by a commissioner, under the act of 1833. *Held*, that the part of the road as thus changed might be opened, though the commissioner's report had not been filed in the clerk's office, &c., as the act requires.—*White v. Morris*.....2

S

SALE BY SHERIFF.

See *SHERIFF'S SALE*.

SALE FOR TAXES.

1. Action of disseisin for certain land which the plaintiff had purchased for taxes in 1827. *Held*, that the statute required the assessment-roll, and the advertisement of sale for taxes, to be filed in the office of the clerk of the Circuit Court; and that

therefore the assessment of the tax, and the advertisement of sale, should be proved by copies certified, not by the clerk of the board of justices, but by the clerk of the Circuit Court.—*Parker v. Smith*.....70

2. *Held*, also, that under the statute of 1824, the defendant in such case may prove, notwithstanding the collector's deed, that from the time the precept came into the collector's hands up to the time of sale, there was sufficient personal property on the premises, out of which the taxes could have been made; and that there was also a tenant on the premises.....*Ibid.*
3. *Held*, also, that the collector's deed under the above named statute, furnishes no evidence that the tax had been legally assessed, or that it had not been duly paid, or that the land was not exempt from taxes.....*Ibid.*
4. *Held*, also, that under that statute such a deed is *prima facie* evidence, and nothing more, of the regularity of the proceedings relative to the purchaser's title, so far as the acts of the collector are concerned.....*Ibid.*
5. The purchaser of real estate for taxes must prove, *inter alia*, in making out his title, that the precept required by the statute had been received by the collector, authorizing him to collect the taxes.—*Doe d. Morris v. Himelick*.....494

SALE OF GOODS.

See *REPLEVIN*, 10. *WARRANTY*.

1. A horse was purchased for eighty dollars, but neither the property nor possession was to pass until the purchaser had executed a note for the price. A note for only eight dollars was, by mistake, executed and delivered in pursuance of the contract. *Held*, that the property in the horse was not changed.—*Litterel v. St. John*326
2. A suit against the vendor of goods founded on *fraud* in the sale, is not sustained by proof of a *warranty*, and breach without fraud.—*Stanley v. Norris*.....353
3. No verbal sale of goods for the price of thirty dollars or upwards is valid under the statute, unless the buyer accept and actually receive part of the goods, or give something in earnest to bind the bargain or in part payment.—*Law v. Hatcher*.....364
4. The property of goods described in

a bill of lading, is, by the owner's indorsement of the bill, vested in the indorsee.....*Ibid.*

5. A sale of goods by an execution-defendant, though *bona fide* and for value, if made after the delivery of the execution to the sheriff, does not affect the lien of the execution.—*McCall v. Trevor et al.*.....496
6. A suit for the non-delivery of goods was held not to lie; the conditions on which the delivery was to have been made not having been complied with.—*Peters v. Gooch*.....515

SALE OF REAL ESTATE.

See VENDOR AND PURCHASER.

SCHOOL DISTRICT.

If the boundary of a school district be changed conformably to a legal petition, the consequent change of the boundary of the adjoining district is valid without a petition.—*Nutter v. The Trustees, &c.*.....351

SCHOOL LANDS.

1. A superintendent of school land, by a written contract without seal, leased to A, in 1824, a part of the land for ten years. *Held*, that as the contract was not under seal, and was for a longer term than the statute authorized, it did not enable a purchaser of the land in 1830 from the school commissioner, to sue A for a breach of the contract.—*Garwood et al. v. Cox*.....93
2. The above named contract did not show in what county the land was situate—its situation being only stated to be in township fifteen, range eight; and the declaration contained no averment to supply this defect. *Held*, that the declaration, were it otherwise good, would be objectionable for want of such an averment. *Ibid.*
3. It was necessary for the declaration in the suit above named, to state that the lease (supposing it to be conformable to the statute) remained uncanceled; and that the trustees of the township had authorized the commissioner to sell the land, and that he had sold it accordingly to the plaintiff. It was also necessary for the declaration to show that the situation of the land, as to place, was such as to authorize the sale. *Ibid.*

SCIENTER.

See WARRANTY, 3.

SCIRE FACIAS.

See ARBITRATION, 4. PARTIES, 2

1. In the case of a separate fine against two persons for a contempt, a joint *scire facias* against them to show cause &c., is not sustainable.—*Thompson et al. v. The State*.....188
2. *Scire facias* to have execution on the transcript of a justice's judgment filed in the Circuit Court. *Held*, that error in the judgment was no defense. *Held*, also, that *oyer* of the transcript was not demandable.—*The Comm. Bank of Kentucky v. Dunn*.....518
3. A *scire facias* against a surety, on a recognizance for his principal's appearance at the next term of the Circuit Court, is not sufficient, unless it show the default of the principal.—*The State v. Humphries*. 538

SCRAWL.

See NOTARY PUBLIC.

SEAL.

See EVIDENCE, 18, 29. NOTARY PUBLIC.

SEALED NOTE.

See BOND, SINGLE.

SEATS OF JUSTICE.

By a statute of 1827, commissioners were appointed to relocate the seat of justice for Dearborn county, and were authorized to receive donations, &c. The statute provided, that as soon as the public buildings were completed at the designated place, that place should forever thereafter be the permanent seat of justice of the county. The commissioners fixed the seat of justice at *Lawrenceburgh*; receiving from certain persons as a donation, an obligation conditioned for building a court house there of a certain description. The court house was accordingly built by the donors conformably to their contract, the expense of which was \$2,500. By a statute of 1835, commissioners were again appointed to relocate the seat of justice of the same county; but the statute made no provision, in case the seat of justice should be removed from *Law-*

renceburgh, for the repayment to the donors of the money they had expended in building the court house. These commissioners fixed the seat of justice at *Wilmington*. *Held*, that the statute of 1835, under the authority of which the seat of justice was removed to *Wilmington*, was not unconstitutional; and that the removal could not be objected to by the persons who built the court house at *Lawrenceburgh*, merely because they had not been repaid the expense of building it.—*Armstrong et al. v. The Board of Commissioners, &c.*.....208

SECONDARY EVIDENCE.

See DISTRESS, 2. EVIDENCE, 2, 7, 8, 13, 14, 20, 27, 30.

SECURITY FOR COSTS.

1. It was ordered by the Circuit Court, that a non-resident plaintiff should give security for costs within twenty days, or that the suit should be dismissed. *Held*, that the Court (the security not having been given according to the order), might permit the plaintiff, at the next term, to file the bond for costs.—*Freeman v. Hukill*.....9
2. The plaintiff, in the case of an appeal from the judgment of a justice in his favour, was a non-resident when the cause was called in the Circuit Court. *Held*, that he might be required to give security for costs, though he was a resident when he commenced the suit, when the judgment was rendered, and when the appeal was taken.—*Malaby v. Hinkston*.....127
3. If at the term to which a rule on a non-resident plaintiff to give security for costs is returnable, the defendant without noticing the rule plead to the merits and go to trial, he waives the benefit of the rule.—*Lindley et al. v. Kindall*.....189

SEDUCTION.

See BASTARDY, 6.

SET-OFF.

See CHANCERY, 9, 10. EXECUTORS AND ADMINISTRATORS, 17.

1. A plea of matters of set-off must be, under the statute, in the form of a plea of payment, setting out, in the conclusion, the matters of set-off.—*Young v. Hurry*.....167

2. A promissory note for the payment of money executed by the plaintiff to a third person, and assigned to the defendant before the commencement of the suit, is a legal matter of set-off.—*Hurd v. Earl*.....184
3. It is not necessary that a plea of payment and set-off under the statute, should show that the amount claimed as a set-off is equal to the plaintiff's demand.....*Ibid.*
4. If such plea be filed, and it be found on the trial that part only of the demand has been paid, the plaintiff is entitled to judgment for the residue; but if it appear that the plaintiff has received more than the amount of his claim, the defendant obtains judgment for the overplus.....*Ibid.*

SEVERAL ISSUES.

See PRACTICE, 11.

SHERIFF'S BOND.

See PLEADING, 6.

1. Debt against a sheriff and his sureties on a bond dated in *March*, 1820, conditioned for the faithful discharge of the sheriff's duties until the then next *August* election, and until his successor should be elected and qualified. The declaration assigned as a breach, that the sheriff had failed to pay over, &c., the revenue of the county for the year 1822, without an averment that no successor to the sheriff had been elected. *Held*, that the declaration contained no cause of action against the sureties.—*Rany et al. v. The Governor*.....2
2. Although the sheriff, in such case, may have been elected his own successor, and may have neglected to qualify under the new appointment, still his sureties in the bond on which the suit was brought, are not laible for his acts after he had received his new commission.....*Ibid.*

SHERIFF'S DEED.

A sheriff's deed may be admissible as evidence, though it recite incorrectly the amount of the execution under which the sale was made; a particular recital of the execution not being necessary to the validity of the deed.—*Doe d. Wilkins v. Rus et al.*.....263

SHERRIFF'S SALE.

See AMENDMENT, 1.

1. After a town-lot had been sold on execution, the execution-debtor brought an ejectment for the lot against a person who claimed it under the purchaser at the sheriff's sale. *Held*, that the propriety of the sheriff's conduct in selling the whole instead of a part of the lot was a proper subject of inquiry; and that evidence relative to the divisibility and value of the lot was in such case admissible.—*Doe d. Maguire v. Smith*.....228
2. The plaintiff in such case, in order to impeach the defendant's title, may prove that when the sheriff sold the lot, it was known to the purchaser and to the defendant that the rents and profits had not been offered for sale.....*Ibid*.
3. Upon an execution for eighty dollars, the sheriff sold a quarter section of land for \$567, and conveyed the same to the purchaser. Ten years afterwards, the execution-defendant, without showing any cause for his delay, objected to the sale for having been so made. *Held*, that the sale, under these circumstances, might be considered on a demurrer to evidence, to have been made in good faith.—*Doe d. Wilkins v. Rue et al.*.....263
4. The statute of 1820, prohibiting the sale of real estate on execution for less than two-thirds of its appraised value, applies only to sales on judgments rendered after the passage of the statute.—*Hobson v. Doe d. Harper et al.*.....487
5. A judgment-debtor can not set up a title in a third person to defeat a purchaser under the judgment. *Ibid*.

SLANDER.

1. Slander. Plea, the statute of limitations. *Held*, that for the purpose of showing malice in the speaking of the words charged, the plaintiff might prove that the defendant had spoken similar words more than a year before the suit was commenced; but that such evidence was not admissible to aggravate the damages.—*Throgmorton v. Davis et ux.*.....174
2. On the trial of an action of slander, some of the actionable words laid in the declaration must be proved, or the plaintiff can not recover; proof

- of equivalent words will not do.—*Moore v. Bond et ux.*.....458
3. An action of slander lies here for words spoken in another State, charging the plaintiff with being guilty of larceny.—*Offutt v. Earlywine*.....460
 4. If the defendant in such action plead in justification that the words are true, he can not sustain his plea without proof, to the satisfaction of the jury, that the plaintiff was guilty of the offense charged.....*Ibid*.
 5. If in slander for actionable words, the speaking of the words be proved, and they be not explained or justified, the jury may infer that the charge is false and malicious. *Yeates et ux. v. Reed et ux.*.....463
 6. In such case, evidence of actual damage is not necessary to the plaintiff's recovery.....*Ibid*.
 7. In a suit against husband and wife for words spoken by the wife, evidence of the husband's efforts to prevent the circulation of the slander, is not admissible in mitigation of damages.....*Ibid*.
 8. Slanderous words, spoken affirmatively in answer to a question, should be laid to have been spoken affirmatively; if spoken in the form of a question, they must be laid to have been spoken interrogatively. *Ibid*.
 9. Under the general issue in slander, the defendant may prove, either in excuse or mitigation according to circumstances, that he was insane when the words were spoken; the insanity, however, must be established, not by reputation, but by direct proof.....*Ibid*.
 10. Words spoken in another State, actionable at common law, are actionable here.—*Linville v. Earlywine.*.....469
 11. When the words complained of in slander derive their slanderous import from extrinsic facts, the declaration must aver those facts, and connect them by a colloquium with the words laid.....*Ibid*.
 12. In slander, neither equivalent words, nor words which derive their identity of meaning with those laid in the declaration from extraneous matter not averred, are sufficient to support the action.....*Ibid*.
 13. Two persons were disputing about their partnership accounts as merchants, when one charged the other

with pilfering out of the store. Slander for these words. *Held*, that to charge another with pilfering is actionable. *Held*, also, that it was not error to permit the plaintiff on the trial to ask a witness who heard the charge, what he understood by it, nor to refuse the defendant leave to prove that the plaintiff attended alone to the store. *Held*, also, that the judgment in this case against the defendant, on his demurrer to the evidence, was not erroneous.—*Becket v. Sterrett*.....499

SON ASSAULT DEMESNE.

See MAYHEM.

SPECIAL BAIL.

See BAIL.

SPECIAL DEMURRER.

See PRACTICE, 10.

SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER, 1.

SPIRITUOUS LIQUORS.

See INDICTMENT, 1.

STATUTE.

See COUNTY. INDIANAPOLIS. INDICTMENT, 4 to 7. KIDNAPPING. MORTGAGE, 9. PERJURY, 1. PRACTICE, 6. SEATS OF JUSTICE. SHERIFF'S SALE, 4. TREATIES, 3. USURY. WABASH AND ERIE CANAL.

1. The courts of this State do not take notice of the statutes of another State, unless they be specially pleaded.—*Irving v. McLean et al.*.....52
2. A statute should be so construed that every part of it, if possible, may be operative.—*Hutchen et al. v. Niblo*.....148

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

SUBPOENA DUCES TECUM.

See EVIDENCE, 3.

SUBSCRIBING WITNESS.

See EVIDENCE, 30.

SURETY.

See PRINCIPAL AND SURETY.

SURPLUSAGE.

See ASSAULT AND BATTERY.

SURVIVOR.

See EXECUTORS AND ADMINISTRATORS, 7.

T

TAXES.

See COUNTY. COUNTY COMMISSIONERS, BOARD OF. EVIDENCE, 14. SALE FOR TAXES.

The motion of a prosecuting attorney under the statute of 1835, for judgment that the title to a lot or tract of land be vested in the State for the non-payment of taxes, will not be granted, unless it appear, *inter alia*, that notice of the motion has been published conformably to the statute.—*Dentler v. The State*.....258

TENANT.

See DISTRESS.

TERRE-TENANTS.

See PARTIES, 2.

TIME, COMPUTATION OF.

A *fiery facias* was issued by a justice of the peace and dated on the 21st of July, 1836. *Held*, that the thirty-six days from the date of the execution, within which the constable was bound to return it, expired on the 25th of August, 1836; and that, therefore, a *scire facias* against the constable, dated on the 26th of August, 1836, for not returning the execution, was not objectionable as having issued too soon.—*Ryman v. Clark*.....329

TITLE-BOND.

See CONSIDERATION, 3. VENDOR AND PURCHASER, 1, 19.

TREATIES.

1. A treaty with the Indians, so far as respects the grants of land to individuals contained in it, is evidence of the grantees' title, and, as such, proper to be laid before a jury.—*Harris v. Doe d. Barnett et al.*.....369
2. The construction of treaties, deeds, &c., belongs to the court as a matter of law.... *Ibid.*

3. A special act of Congress respecting a grant of real estate to an individual under an Indian treaty, can have no efficacy, if passed subsequently to the grantee's death, in confirming his title; but the act may be evidence for a jury, in explanation of the treaty, relative to the situation of the land.....*Ibid.*

TRESPASS.

See PLEADING, 16, 19. WABASH AND ERIE CANAL, 3.

1. Trespass for breaking and entering the plaintiff's close and stable, and taking away two horses. Plea, that an execution of *fieri facias* against a third person was delivered to the sheriff, &c.; that the horses belonged to the execution-debtor, and were subject to the execution; that the sheriff, by virtue of the execution, and the defendants by his command, broke and entered into the close and stable, and took the horses, &c. Replication, that the horses did not belong to the execution-debtor, but to the plaintiff. *Held*, on general demurrer, that the replication was sufficient.—*M'Gee v. Givan et al.* 16
2. A justification in trespass, under a judgment and execution of *A*, a justice, requires proof that *A* is a justice—*Hunter v. Harris et al.* 126
3. In a declaration in trespass *quare clausum fregit*, the name of the county was in the margin, and the close was described as situated in that county. *Held*, that the venue was well laid.—*Rucker v. McNeely.* 179
4. If a person cut down another's trees, the trespasses, if repeated, may be laid in the declaration to have been committed on different days and times, though they can not be laid with a *continuando*.....*Ibid.*
5. The declaration in trespass *quare clausum fregit* charged the defendant with breaking the plaintiff's close, and then and there cutting down certain trees, &c. *Held*, that the breaking the close was the gist of the action, and the cutting down the trees only matter of aggravation. *Held*, also, that it was no objection to the whole count, in such case, that the matter in aggravation was not well laid.....*Ibid.*
6. If a plea in trespass *quare clausum fregit* justify the gist of the action, and the plaintiff wish to prove that

the defendant exceeded the right or authority alleged in his justification, the excess must be specially replied. —*West et al. v. Blake*.....234

7. The jury, in trespass to personal property, can not increase the amount of their verdict for the plaintiff, by an allowance of counsel fees.—*Young v. Tustin*.....277
8. The plaintiff in such suit can not recover damages which are not implied by law from the wrong committed, unless they are specially stated in the declaration.....*Ibid.*
9. Trespass for breaking the plaintiff's close and taking away his grain. Special plea, that the close was the freehold of *A*, and that by his license the defendant entered, &c. *Held*, that the plea was good. *Held*, also, that the facts contained in the plea might be given in evidence under the general issue.—*Rasor v. Qualls.*286
10. It does not necessarily follow, because the general issue is pleaded to an action of trespass *quare clausum fregit*, that the title to the land will be the subject of inquiry.—*Maxam et al. v. Wood*.....297
11. Trespass *q. cl. fr.* before a justice, not guilty pleaded, and judgment for the plaintiff. Appeal to the Circuit Court and judgment there for the plaintiff. The subject of inquiry at the trial was not shown by the record. *Held*, that the Supreme Court must presume that the title to the land was not in question at the trial.....*Ibid.*
12. It is not necessary to a constable's justification of an arrest, under a *capias ad respondendum* issued by a justice, that the writ be preceded by an affidavit. *Aliter*, if the justification be by the party or by the justice.—*Davis v. Bush*.....330
13. When an officer justifies an arrest under process which he is bound to return—the return day being past—the plea must allege a return...*Ibid.*
14. If to a declaration in trespass containing several counts, the introductory part of a plea in justification be confined to the first count, and an attempt be made in the body and conclusion of the plea to embrace the whole declaration, the plea is bad*Ibid.*
15. In trespass for taking away a yoke of oxen the jury, in estimating the damages actually sustained by the

plaintiff, ought not to add to the value of the oxen any amount for their services.—*Anihony v. Gilbert.*

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16. If the trespass have been committed with malice, insult or deliberate oppression, the jury may join exemplary damages to the pecuniary loss..... *Ibid.*
17. Under a plea, in such suit, of property in a third person, evidence of such ownership at the time of the taking is admissible..... *Ibid.*
18. The defendant may show in mitigation of damages, under the general issue in this suit, that the goods, at the time of the taking, belonged to a third person, and that the plaintiff was not liable for them to the owner..... *Ibid.*
19. And *semble*, that, under such issue, evidence in bar of the suit may be adduced, showing that a third person owned the property, and that the defendant acted under his authority..... *Ibid.*
20. A justice of the peace who issues a writ of domestic attachment, by which the goods of an absconding debtor are attached, without requiring a bond to be previously filed, according to the statute—and the party who procures such writ to be issued without previously filing the bond—are trespassers, and liable as such to the party injured.—*Barkeloo v. Randall et al.*.....476
21. If in trespass for an assault and battery, *son assault demesne* be pleaded, the plaintiff may, under the replication of *de injuria*, &c., prove that the defendant's battery was *excessive*.—*Fisher v. Bridges*.....518

TRIAL.

See JURY, 5, 6. JUSTICE OF THE PEACE, 22.

If neither party, on appeal to the Circuit Court, require a jury, the cause may be tried without a jury, though the amount in controversy exceed twenty dollars.—*Minton v. Moore.*

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TRIAL OF RIGHT OF PROPERTY.

See RIGHT OF PROPERTY, TRIAL OF.

TROVER.

See DEPOSITS IN BANK, 3.

1. To support the action of trover, there must be proof of property in

the plaintiff, possession to have been in the defendant, and a conversion by the defendant.—*Traylor et al. v. Horral*.....317

2. The gist of such action is the conversion; and unless the defendant has had an actual or virtual possession of the goods, he can not be charged with a conversion of them to his own use..... *Ibid.*
3. The gist of the action of trover is the conversion of the plaintiff's goods; and no special plea in bar of the action can be good, unless it confesses and avoids the conversion.—*Coffin v. Anderson*.....395
4. A plea in trover for bank notes, that the defendant, as cashier of a bank, received them in bank from the holder, on special deposit, is bad. *Ibid.*
5. If the plaintiff's interest in the goods for which trover is brought be not sufficient to sustain the suit, the proper plea is not guilty.... *Ibid.*
6. If a person refuse to deliver goods in his possession to the owner, saying that they belong to another, such refusal is evidence of a conversion *Ibid.*
7. Trover for bank notes can not be sustained for want of property in the plaintiff, if it appear that he had obtained the notes by means of a forgery committed by himself or with his knowledge; and the forgery, &c., may be proved by circumstantial evidence..... *Ibid.*
8. The *bona fide* possession of goods gives a sufficient property to the possessor to enable him to maintain an action of trover for them against a wrong doer..... *Ibid.*
9. Trover. Plea, a former recovery in assumpsit for the non-performance of the same promises mentioned in the declaration. *Held*, that the plea was bad.—*Smith v. Scantling*.....447

TRUST.

See LIMITATIONS, STATUTE OF, 1.

1. If A purchase land with B's money, and take the conveyance in his own name, he holds the land in trust for B; and the land so held is liable for the debts of the *cestui que trust*.—*Blair v. Bass*.....539
2. Such a trust may be established by parol testimony, even against the answer of the trustee. In such case, however, the bill must be supported not only by two witnesses, or by one

witness and corroborating circumstances, but the testimony must be clear and should be received with great caution.....*Ibid.*

3. It can not be shown by parol evidence, in order to establish a trust in real estate, that the person having the legal title purchased the estate with his own money for the use of another; that would be to overturn the statute of frauds.....*Ibid.*

U

UNINCORPORATED COMPANY.

See COMPANY, UNINCORPORATED.

USURY.

1. To an action of debt on a promissory note for the payment of \$150 at a future time, the defendant pleaded, as to fifty dollars of the amount, that the consideration of the note was a previous debt of \$100 and a promise to delay its collection, and was therefore as to fifty dollars usurious. *Held*, that the promise for the forbearance as shown by the plea, being in writing and signed by the defendant, was valid under the statute of 1831.—*Taylor v. Meek*..388
2. The word *agreement* in the above named statute relative to the payment of a higher interest. &c., like the same word in the statute of frauds respecting the payment of the debt of another, is used as synonymous with the word *promise*.....*Ibid.*
3. A contract respecting the payment of interest, made whilst the above named statute was in force, must be governed by that statute.....*Ibid.*

V

VARIANCE.

See CARRIERS, 1. EVIDENCE, 12. PLEADING, 8, 9.

1. This was an indictment for perjury against *John G. Tardy*; and the affidavit on which the perjury was assigned is alleged in the indictment to be signed by him. *Held*, that an affidavit signed *John Gariel Tardy* was not, in consequence of the variance, admissible as evidence in support of the indictment.—*Tardy v. The State*.....152
2. There is not a fatal variance between the name *Beckwith* in a warrant named in an indictment, and

Beckworth in that produced on the trial.—*Stewart v. The State*.....171

3. In a suit against a carrier, the declaration stated the goods to have been delivered to the defendant on board a schooner to be safely carried from *Michigan City* to *Buffalo*, &c., "the dangers of the seas only excepted." The exception contained in the bill of lading offered in evidence by the plaintiff was, "the dangers of the lakes and rivers excepted." *Held*, that the variance was immaterial.—*Harrison et al. v. Hixson et al.*.....226
4. In a suit against *Elisha Harris*, alias *Elisha B. Harris*, a judgment against *Elisha Harris* was objected to as evidence on the ground of variance. *Held*, that the objection was untenable.—*Harris v. Muskingum M. Co.* 267

5. Covenant on a lease of a tavern with certain articles for house-keeping. Among the articles specified in the declaration, are three termed *two was-pans* and *one pair of waffle*. The lease produced on *oyer* mentions the same articles with those set out in the declaration, but describes the three above named as *two wash-pans* and *one pair of waffle-irons*. The lease produced showed also that several words in it (which were in the declaration) had been crossed with a pen, but in such a manner as to leave them legible. The declaration did not profess to set out the lease *in hæc verba*. *Held*, that a demurrer for the variance could not be sustained.—*Lynch v. Wilson*.....288
6. When the pleader professes to give the tenor of a writing, or when *oyer* of a deed is given and *non esse factum* pleaded, or when a record is described and *nul tiel record* pleaded, verbal variances, except in cases of misspelling, where the *idem sonans* is preserved and the sense of the word not changed, are fatal.....*Ibid.*
7. The declaration averred the suit to be "on the relation of *Susanna H.*" to the plaintiff's damage "for the use of *Susan H.*" Breach, non-payment "to the said *Susan H.*" *Held*, that there was no variance.—*Trimble et al. v. The State*.....435
8. A count on a promise to execute a promissory note is not sustained by proof of a promise to pay money.—*Hatten v. Robinson*.....479
9. An alleged variance, not shown by

the record, can not be noticed by this court.—*Matheny v. Westfall*. 491

VENDOR AND PURCHASER.

See AGENT OF STATE. AMENDMENT, 1. CONSIDERATION, 2, 3. FRAUDS, STATUTE OF, 1, 2, 3. LIEN. SALE FOR TAXES. SALE OF GOODS. SHERIFF'S SALE.

1. *A* purchased of *B* a certain tract of land for the sum of \$250. He paid \$100 in hand, and gave his notes for the residue of the purchase-money; and *B* gave him a bond conditioned for a conveyance when the notes should be paid. There was a mortgage on the land at the time in favor of *C*, of which *A* had no knowledge; and *B* fraudulently represented to *A* that the land was unincumbered. The payments afterwards made by *A* to *B*, with the mortgage debt which he also paid, amounted to the sum due on the notes. On a bill in chancery filed by *A*, the court decreed that he was entitled to a conveyance, and appointed a commissioner to execute the deed. It was further decreed that the notes should be delivered up to the complainant.—*Rodman v. Williams*.....70
2. The purchaser of real estate in the possession of a third person, is bound to take notice of such person's title to the possession, whether his title be legal or equitable.—*Johnston v. Glancy et al.*.....94
3. Debt on a sealed note for the payment of \$100. Plea, that the note was given in part consideration of a certain half quarter section of land, received by the defendant from the plaintiff in exchange for another tract; that at the time of the contract and to induce the defendant to make it, the plaintiff represented to him that he had measured the half quarter section of land, and that it included a certain field, and a certain piece of bottom land containing fifteen acres; that the defendant, ignorant of the boundaries of the land, and relying on the plaintiff's representation, made the exchange and gave the note; that the defendant has since discovered that the land so received by him does not include the field or bottom land, and that it is not worth as much by \$200 as it would have been had its situation been as the plaintiff represented it. *Held*, on demurrer, that the plea was a bar to the action.—*Cowger v. Gordon et al.*.....110
4. If the vendor of real estate undertake to point out to the purchaser the boundaries of the land, or the place where it lies, or its improvements, he does it at his peril and is liable for any mistake in the description *Ibid.*
5. A person being in possession of eighty acres of land belonging to the *United States*, upon which he had erected a mill, but to which land he had no claim, sold his possession for \$350 and received the purchase-money. He informed the purchaser, at the time of the contract, that he had no title, and that the land belonged to the *United States*. The purchaser afterwards sued the vendor, in *indebitatus assumpsit*, to recover back the purchase-money. *Held*, that the action could not be sustained.—*Vest v. Weir et al.*.....135
6. Two persons made a written agreement, by which one of them agreed to sell to the other certain real estate. A part of the price was to be paid on a subsequent day, and notes were to be given for the payment of the residue in equal annual installments. After all the payments should be made, the conveyance was to be executed. There was nothing said in the agreement respecting the possession of the premises. *Held*, that the legal inference from the contract was, that the possession was to be given when the deed should be executed.—*Holmes v. Schofield et al.*.....171
7. The vendor of a tract of land containing a certain number of acres brought a suit against the vendee for the purchase-money. The defendant who retained the land, but who wished to have a reduction of the price, proved that a certain field, which the vendor had represented to be included in the premises, was not so included. *Held*, that the question whether the land was worth less, and if so, how much less, than it would have been had the boundaries not varied from the description, was a proper subject of inquiry; and that the plaintiff, as well as the defendant, had a right to introduce evidence on the subject.—*Gordon et al. v. Cowger*.....231
8. That the vendor of real estate has no title to the property, is a good

- defense to an action against the purchaser on a bond executed by him for the purchase-money, whether the suit be brought by the obligee or assignee of the bond.—*Bryan v. Blythe et al.*.....249
9. If a purchaser of real estate enter into possession of the property and make improvements on it, under a parol contract of sale, there is a sufficient part performance of the contract to take it out of the statute of frauds: *a fortiori*, if he have also paid the purchase-money.—*Moreland v. Lemasters.*.....383
10. If a person purchase such estate with notice, actual or constructive, of an outstanding equitable title, his legal title will not affect the outstanding equity.....*Ibid.*
11. The occupancy of the estate by a third person, whether the purchaser have a knowledge of it or not, is constructive notice to the purchaser of the occupant's title.....*Ibid.*
12. The purchaser of an estate with notice of an outstanding equity, is as much bound as his vendor was to perform the prior contract.....*Ibid.*
13. If in the case of a sale of real estate, the deed is to be made and the price paid on the same day, the vendor can not sue for the price unless he has, of his own accord, performed or offered to perform his part of the contract.—*Warner v. Hatfield.*.....392
14. To such suit, a plea stating that the plaintiff had not executed the deed (omitting to state that he had not offered to execute it), is insufficient.....*Ibid.*
15. A contract to execute a good and sufficient title to real estate can not be complied with, whilst a part of the premises are held by third persons under unexpired leases.....*Ibid.*
16. A conveyance of real estate was, by the contract of the parties, to be executed on payment of the purchase-money; and the money was to be paid *on or before the 1st of May, 1834*. The money was tendered, and the deed demanded, *on the 29th of April, 1834*. Held, that the tender and demand were valid.—*Barbee v. Inman.*.....420
17. If the vendor in such case, having by the contract the right to designate the point, between two given points, for the beginning corner of the tract, refuse, when properly applied to, to exercise that right, the point may be designated by the vendee.*Ibid.*
18. The notice to a purchaser of a previous unrecorded conveyance for the land is not binding, unless it be given by a person interested in the property, and in the course of the treaty for the purchase. A purchaser will not be bound by notice in a previous transaction which he may have forgotten.—*Gray v. Woods.* 432
19. If the obligor of a title-bond had no title to the premises at the time the deed was to be executed, the obligee may sue on the bond without having demanded the deed.—*Blann v. Smith.*.....517

VENIRE DE NOVO.

See VERDICT, 3.

VENUE.

See PLEADING, 8, 9. TRESPASS, 3.

VERDICT.

See ARREST OF JUDGMENT. EXECUTORS AND ADMINISTRATORS, 17. FORCIBLE ENTRY AND DETAINER, 2. REPLEVIN, 1. RIOT.

1. If a good cause of action be stated in the declaration, though it be defectively stated, a general verdict for the plaintiff cures the defect. *Aliter*, if the declaration contain no valid cause of action.—*Dickerson v. Hays.*44
2. If the verdict against a defendant on an indictment be informal, the jury may alter it on motion of the prosecuting attorney, with the consent and in presence of the Court, so as to give it the form of a general verdict of guilty.—*McGregg v. The State.*.....101
3. If no judgment can be rendered in consequence of the imperfection of the verdict, the Court awards a *venire de novo*.—*Boxley et al. v. Collins.*320

VOIRE DIRE.

See CHALLENGE, 2.

W

WABASH AND ERIE CANAL.

1. The statute of 1832, respecting the Wabash and Erie canal, authorizes the canal commissioners and their

agents to enter upon and use any land, and take any materials necessary for the work, without the owner's consent, and without previously making him compensation. The property must be paid for, however, before the title becomes vested in the State.—*Rubottom et al. v. McClure*.....505

2. The statute above named, authorizing the appropriation of private property for public use, and providing for a subsequent compensation for the property so applied, is not unconstitutional.....*Ibid.*
3. If a defendant in trespass *quare clausum fregit* justify under the above named statute, the plea need not aver that the commissioners had taken the proper measures to ascertain the damages. If such measures have not been taken, and the failure can avail the plaintiff, it should be replied.....*Ibid.*

WAGERS.

1. If goods be won on a wager respecting the result of a presidential election, and be delivered to the winner, the loser can not, either at common law or under our statute, sustain an action against the winner for the price of the goods.—*McHatton v. Bates et al.*.....63
2. Such a wager is illegal, and if the goods be not delivered to the winner, he is without remedy.....*Ibid.*

WAIVER.

See APPEAL, 6, 8, 12. JURISDICTION,
1. JURY, 4. RIGHT OF PROPERTY,
TRIAL OF, 4. SECURITY FOR COSTS, 3.

WARRANTY.

See SALE OF GOODS, 2.

1. The breach of an express warranty as to the soundness of a horse is, of itself, a valid ground of action; whether the suit be founded on tort or on contract.—*House v. Fort*...293
2. If the suit in such case be in tort, the form of the declaration is, that the defendant falsely and fraudulently warranted, &c.; but the words *falsely* and *fraudulently* thus used are only matters of form.....*Ibid.*
3. In the case of an express warranty, a *scienter* need not be laid, nor if laid need it be proved.....*Ibid.*
4. In a suit on the warranty of the soundness of a horse, proof of the warranty and of the breach estab-

lishes the plaintiff's case; but an oral affirmation of the soundness of the horse, which was exposed at the time to the buyer's inspection, is not a warranty, unless it was so intended by both parties; and that intention must be shown to the satisfaction of the jury*Ibid.*

5. If a horse is warranted sound and wants the sight of an eye, an action lies; but a statement by the seller, that the horse's eyes are as good as any horse's eyes in the world, does not of itself amount to a warranty. *Ibid.*

WIDOW.

See DESCENTS. DOWER. EXECUTORS
AND ADMINISTRATORS, 1, 11.

WITNESS.

See EVIDENCE, 30. NEW TRIAL, 1, 4.
RIGHT OF PROPERTY, TRIAL OF, 2.

1. The administrator of a guardian was sued in chancery by the administrator of the ward, for money received by the guardian from the administrator of the ward's father, as a part of the ward's distributive share of his father's estate. *Held*, that the administrator of the ward's father was not a competent witness, to prove that the guardian had received from the witness the money sued for.—*Raymond et al. v. Simonson*.77
2. If the defendant, on being examined as a witness before arbitrators in a suit referred by a justice, state that he has no knowledge respecting a particular item in the account sued for, he does not thereby admit the correctness of that part of the account.—*Claypool v. Miller*.....163
3. Whether an arbitrator is a competent witness in support of a motion to set aside an award?—*quære*.....*Ibid.*
4. Trespass *q. cl. fr.* for breaking the plaintiff's stable and taking away his horse. Pleas, 1st. That the stable was in the possession of the defendant and one *A*, as tenants of the plaintiff; that the horse belonged to the defendant and *A*, and was in *A*'s part of the stable, &c. 2d. That *B* had obtained a judgment against *C* before a justice, and the defendant and *A* were *C*'s replevin-bail; that a *fi. fa.* was issued on the judgment and delivered to a constable; that the horse was *C*'s, but the plaintiff kept him concealed and locked

- up in the stable, and refused to deliver him, &c.; and that the defendant, by A's permission, opened the stable, &c. Replications to these pleas, and issues. *Held*, on the trial, that A was a competent witness for the defendant.—*Nooe v. Higdon*.....184
6. Debt on a promissory note for fifty dollars, brought by the assignee of the payee against the maker. The defendant offered in evidence, under the general issue, a deposition stating that the note was given to the payee in payment of a horse which belonged to the witness and the payee; that the payee afterwards agreed that the witness should receive from the defendant one-half the amount of the note, and that the witness did receive from the defendant twenty-five dollars in part payment of the note. *Held*, that an objection to the deposition on the ground that the witness was interested, could not be sustained.—*Le Clair v. Peterson*273
8. A witness called to give an opinion relative to the defects of a horse's eyes, stated that he was not a farrier, but that he professed to understand when he tried a horse, whether his eyes were good or not, though there might be diseases of the eyes of horses with which he was unacquainted. *Held*, that the witness might be examined.—*House v. Fort*.....293
7. An Indian is not a competent witness under the statute of the State; but the Supreme Court can not presume that a witness, admitted as competent in the Circuit Court, was an Indian, merely because he was the principal chief of an Indian nation.—*Harris v. Doe d. Barnett et al.*.....369
8. If a witness be impeached by proof of his having previously made statements inconsistent with his testimony, he may be corroborated by evidence of other statements made by him in accordance with his testimony. *Aliter*, if he has not been thus impeached.—*Coffin v. Anderson*.....395
9. The maker of a promissory note is a competent witness for the plaintiff, in an action by the assignee against the assignor, involving the validity of the consideration of the note.—*Fosdick v. Starbuck*.....417
10. If the payee of a note assign it, and the assignee sue the maker, the plaintiff, having released the payee, may examine him as a witness to prove the execution of the note.—*Matheny v. Westfall*.....491
11. An agent is generally admitted as a witness, from necessity, to prove his delivery of goods or payment of money for his principal.—*Doe d. Morris v. Himelick*.....494

WRIT.

See BASTARDY, 5. CAPIAS AD RESPONDENDUM. REFLEVIN, 2.

WRIT OF INQUIRY.

See INQUIRY, WRIT OF.

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